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

PRESENT: O. PETER SHERWOOD PART 61
Justice

GULZAR MOHAMMAD,

Plaintiff,

-against-

BIG APPLE CAR, INC. and EARL PATTERSON,

Defendants.

INDEX NO. 113670/08

MOTION DATE Aug. 13, 2010

MOTION SEQ. NO. 003

MOTION CAL. NO. 67

The following papers, numbered 1 to 5 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the motion of defendant Big Apple Car, Inc., pursuant to CPLR § 3212, for summary judgment in its favor dismissing the complaint as against it is decided in accordance with the accompanying decision and order.

Dated: 12/16/10

O. P. Sherwood

O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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 61

----------X

GULZAR MOHAMMAD,

Plaintiff,

-against-

BIG APPLE CAR, INC. and EARL PATTERSON,

Defendant.

----------X

DECISION AND ORDER

Index No. 113670/2008

O. PETER SHERWOOD, J.:

In this action, plaintiff Gulzar Mohammad ("plaintiff") seeks to recover damages for personal injuries he allegedly sustained when he was assaulted by defendant Earl Patterson ("Patterson"), then an employee of defendant Big Apple Car, Inc. ("Big Apple"). Plaintiff proceeds upon theories of respondeat superior and negligent hiring and supervision. Big Apple moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against it on the ground that there is no evidence that Big Apple knew or should have known of Patterson's violent propensities.

Background

On July 12, 2006, Patterson was working as a dispatcher for Big Apple, a livery dispatch service. At the time of the incident, plaintiff was apparently a driver of a livery car who was affiliated with Big Apple. On that date, Patterson is alleged to have assaulted plaintiff without cause or provocation causing plaintiff to sustain physical and emotional injuries.

Plaintiff commenced this action against Big Apple and Patterson[1] on October 9, 2008, by filing the summons and verified complaint which asserts two causes of action against Patterson for assault and gross negligence (1st and 2nd causes of action) and two causes of action against Big Apple predicated upon the vicarious liability of an employer for the acts of its employee within the scope of the employment (3rd cause of action) and negligent hiring and supervision (4th cause of action).

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[1]By decision and order dated January 27, 2010, plaintiff's motion for a default judgment against defendant Earl Patterson for failure to appear or answer was granted as to liability with the inquest on damages to be held at the time of trial or other disposition as to the remaining defendant Big Apple Car, Inc.

In support of its motion for summary judgment, Big Apple submits the affirmation of its attorney who contends that there has been no testimony that Big Apple had actual or constructive notice that Patterson had a history of violent behavior nor did plaintiff assert in his Bill of Particulars that Patterson committed any prior assaults on others. In addition, Big Apple's counsel contends that fighting was outside the scope of Patterson's employment as a dispatcher with Big Apple. In sum, Big Apple's attorney contends that Big Apple may not held vicariously liable for plaintiff's injuries caused by the assaultive behavior of its employee.

Big Apple also submits an affidavit of Diana Clemente, Big Apple's President in which she states that Patterson was hired after being recommended by an employee of its client Citibank and she was not aware of Patterson committing any prior assaults either before his being hired or while employed by Big Apple. Ms. Clemente further stated that she was unaware prior to the subject incident that Patterson had any violent propensities.

In opposition, plaintiff contends that there are numerous issues of fact which preclude the grant of summary judgment in Big Apple's favor. Specifically, based upon the deposition testimony of Diana Clemente, plaintiffs avers that there are issues as to the negligent hiring cause of action regarding whether Big Apple breached a duty to plaintiff by failing to check Patterson's references, whether a check of the references would have created a duty of further inquiry or supervision, and whether the attack on plaintiff was foreseeable. Ms. Clemente testified that she was not familiar with Big Apple's hiring process, but stated that they would not generally call references for a dispatcher out of concern that the employer might then try to retain the employee. Big Apple also did not perform any criminal background checks on any employees, but did such checks on drivers.

With respect to his respondeat superior cause of action, plaintiff contends that there are issues of fact as to whether Big Apple should have known about Patterson's propensities and whether Big Apple properly trained and supervised Patterson on the job. In this respect, plaintiff points to Ms. Clemente's testimony at her deposition that Big Apple has no training manual and that she did not even know whether Big Apple had a training process. Nor did Big Apple maintain an incident report with respect to Patterson's assault on Plaintiff.

In reply, Big Apple points out that the Note of Issue has been filed and plaintiff has failed to exchange a notice witness as to Big Apple's actual or constructive notice of Patterson's past criminal

conduct or violent propensities. Nor did plaintiff allege in his Bill of Particulars that Patterson had committed prior assaults or crimes. Big Apple further argues that while contending that Big Apple should have done more to investigate Patterson prior to his hiring, plaintiff does not state what such an investigation of Patterson would have shown. Rather, Big Apple notes that Ms. Clemente testified that Patterson was recommended for the dispatcher position by an employee of Citigroup where Patterson had been in charge of ground transportation and that Big Apple relied on that recommendation in hiring Patterson. Moreover, Big Apple argues that Patterson had no authority to exercise physical force in his job and that neither control nor supervision would have prevented a sudden attack.

Discussion

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, a party making a motion for summary judgment must, in the first instance, make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Center,* 64 NY2d 851, 853 [1985]). If the party succeeds in making this showing, the burden then shifts to party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Casper v Cushman & Wakefield,* 74 AD3d 669 [1st Dept 2010]; *Mazurek v Metropolitan Museum of Art,* 27 AD3d 227, 228 [1st Dept 2006]). The party opposing the motion is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties (*see Myers v Fir Cab Corp.*, 64 NY2d 806 [1985]; *Marshall v Vilar,* 303 AD2d 466 [2d Dept 2003]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]). Bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

1. *Negligence*

The threshold question with respect to a negligence cause of action is whether the alleged tortfeasor owes a duty of care to the injured party (*see Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]; *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]). Whether or not such duty exists and the scope of such duty is generally a legal question for the court to resolve (*see 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr, Inc.*, 96 NY2d 280, 288 [2001]; *Sheila C. v Povich*, 11 AD3d 120, 125 [1st Dept 2004]). "In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]).

The doctrine of respondeat superior renders an employer liable for a tort committed by its employee within the scope of his or her employment (*see Riviello v Waldron*, 47 NY2d 297, 302 [1979]). Thus, an employer may be held liable even for the intentional torts of an employee where the employee was acting within the scope of his or her employment at the time of the commission of the tort or the tort was condoned, instigated or authorized by the employer (*see Yeboah v Snapple, Inc.*, 286 AD2d 204, 204-205 [1st Dept 2001]; *Kwak v Wolfenson*, 258 AD2d 418 [1st Dept 1999]).

Here, there is nothing in the record tending to show that Patterson's assault upon plaintiff was within the scope of his employment as a Big Apple dispatcher or that Big Apple in any way condoned, instigated or authorized such behavior. The alleged act was not part of Patterson's job and did not serve his employer's interests. His actions must be deemed to have been committed for purely personal motives and to have been a departure from his duties as a dispatcher. Thus, Big Apple cannot be held vicariously responsible for Patterson's actions and summary judgment must be granted dismissing the third cause of action.

2. *Negligent Hiring and Supervision*

In cases where an employer cannot be held vicariously liable for the intentional torts of its employee, the employer may still be held liable under theories of negligent hiring, negligent retention and/or negligent supervision (*see Sheila C.*, 11 AD3d at 129). The negligence of the employer in such cases is direct, rather than vicarious, and stems from the employer having placed the employee in a position to cause foreseeable harm which could have been avoided had the employer exercised reasonable care in the hiring, retention and supervision of the employee (*id.*; *see Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006]; *Rodriguez v United Transp. Co.*,

246 AD2d 178, 180 [1st Dept 1998]; *Detone v Bullit Courier Serv., Inc.*, 140 AD2d 278, 279 [3d Dept 1988], *lv denied* 73 NY2d 702 [1988]). A necessary element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the plaintiff's injury (*see G.G. v Yonkers Gen'l Hosp.*, 50 AD3d 472 [1st Dept 2008]; *White v Hampton Mgt. Co., LLC*, 35 AD3d 243, 244 [1st Dept 2006]). An employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past (*see Yeboah*, 286 AD2d at 205).

In this case, Big Apple made a *prima facie* showing, through the affidavit of its President and Patterson's application for employment, that it had no notice, either actual or constructive, that Patterson had any history of assaultive behavior. Plaintiff has offered nothing in Patterson's background that would have placed Big Apple on notice that he had a propensity for assaultive behavior or which would have rendered the possibility of an assault reasonably foreseeable. Nor has plaintiff produced any evidence to demonstrate that had Big Apple investigated, trained and supervised Patterson before and during his employment that the subject assault would not have occurred. Thus, plaintiff has failed to rebut Big Apple's *prima facie* showing of its entitlement to summary judgment as a matter of law by raising a triable issue of fact and no basis exists to hold Big Apple liable upon a theory of negligent hiring and retention.

Conclusion

Based upon the foregoing discussion, it is

ORDERED that the motion of Big Apple Car, Inc. for summary judgment in its favor is granted and the complaint is dismissed in its entirety as against said defendant Big Apple Car, Inc. with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued as against defendant Earl Patterson; and it is further

ORDERED that the matter is hereby referred to the Special Referee Clerk (Room 119) for placement at the earliest possible date upon the calendar of the Special Referees' Part for an inquest and assessment of damages due plaintiff provided that not later than January 14, 2011, plaintiff

serves a copy of this Order with Notice of Entry, Notice of Inquest and a Note of Issue on the defaulting defendant Earl Patterson and serves a copy of this Order upon the Clerk of the Special Referee Part, Room 119 M, at 60 Centre Street not later than January 28, 2011 ; and it is further,

ORDERED, that upon determination of the amount due to plaintiff by the Special Referee, plaintiff shall have leave to enter a Clerk's judgment in such sum as determined by the Special Referee and costs and disbursements as taxed by the Clerk; and it is further

ORDERED that movant shall serve a copy of the order with notice of entry upon all parties within 20 days of entry.

This is the decision and order of the court.

DATED: December 16, 2010

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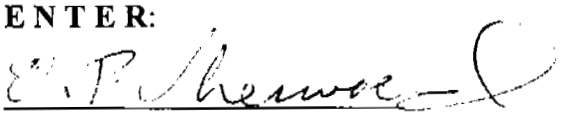

O. PETER SHERWOOD
J.S.C.