

Ramirez v Genovese
2010 NY Slip Op 33926(U)
October 15, 2010
Sup Ct, Westchester County
Docket Number: 26231/08
Judge: Lester B. Adler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON 10-20 2010
WESTCHESTER
COUNTY CLERK

ERNESTO R. RAMIREZ and MARIA LUZ
RAMIREZ,

Plaintiffs,

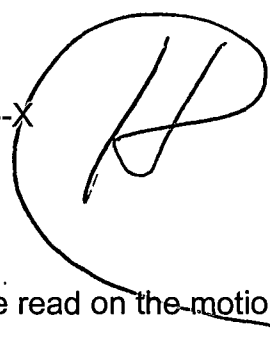
-against-

SHORT FORM ORDER

DANIEL GENOVESE, MANHATTANVILLE
COLLEGE, SECURITAS SECURITY SERVICES
USA, INCORPORATED and DAMON JARETT,

Index No.: 26231/08

Defendants.



FILED
OCT 20 2010
TIMOTHY C.
COUNTY CLERK
COUNTY OF WESTCHESTER

ADLER, J.

The following papers numbered 1 to 9 were read on the motion of defendants Securitas Security Services USA, Inc. ("Securitas") and Damon Jarett ("Jarett") to dismiss the third cause of action pursuant to CPLR §3211(a)(7) and, in the alternative, for summary judgment pursuant to CPLR §3211(c):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion; Affidavit of William R. Webb;	
Affirmation of Rodrigo Armand, Jr., Esq.; Exhibit	1-4
Memorandum of Law in Support of Motion	5
Affidavit of Ernesto R. Ramirez in Opposition	6
Plaintiff's Reply Memorandum of Law in Opposition to Motion to Dismiss/Summary Judgment	7
Affirmation of Paul L. Neugebauer, Esq. In Opposition to Motion to Dismiss/Summary Judgment	8
Reply Affirmation of Rodrigo Armand, Jr., Esq.	9

Defendants Securitas and Jarett move to dismiss the third cause of action pursuant to CPLR §3211(a)(7) on the ground that plaintiff has failed to state a cause of action against them. In the alternative, Securitas and Jarett move for summary

judgment pursuant to §3211(c) on the ground that no triable issue of fact exists as to a duty owed by these defendants to plaintiff Ernesto R. Ramirez.

The Court will first address the application to convert the motion to dismiss into a motion for summary judgment, since a determination on the sufficiency of the allegations under CPLR §3211(a)(7) is not required if conversion is granted.

The Court must first determine whether notice to the parties of the Court's intention to treat the motion as one for summary judgment is required.

A motion to dismiss made pursuant to CPLR §3211 may be treated as one for summary judgment where "adequate notice" has been given to the parties (CPLR §3211[c]). Here, prior to interposing an answer, defendants Securitas and Jarett have moved to dismiss the complaint for failure to state a cause of action (see CPLR 3211[a][7]) or, in the alternative, to treat the motion as one for summary judgment. In response to defendants' alternative request for relief, plaintiff states that, because a copy of the contract between Securitas and defendant Manhattanville College was annexed to the moving papers, treatment of the motion as one for summary judgment is appropriate. Plaintiff has further submitted the affidavit of Ernesto R. Ramirez in opposition to the motion for summary judgment.

There are three exceptions to the requirement of notice: 1) where the only issue presented is an issue of law; 2) the request for CPLR §3211(c) treatment is made by both sides; and 3) both sides "make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course" (*Four Seasons Hotel Ltd. v. Vink*, 127 A.D.2d 310, 320, 515 N.Y.S.2d 1; see also *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288). Plaintiff has specifically stated that CPLR

§3211(c) treatment is appropriate under the circumstances. Even assuming this statement does not constitute a “request,” clearly both parties have indicated that they are “deliberately charting a summary judgment course” (see *Jamison v. Jamison*, 18 A.D.3d 710, 796 N.Y.S.2d 625; *TSI/Impreso v. Cosmos Forms, Ltd.*, 202 A.D.2d 493, 494, 609 N.Y.S.2d 59).

Turning now to the merits of the motion, it is well settled that in order to prevail on a motion for summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [citations omitted]). Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York University Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *St. Luke’s-Roosevelt Hosp. v. American Tr. Ins. Co.*, 274 A.D.2d 511, 712 N.Y.S.2d 372). However, once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he [or she] rests his [or her] claim or must demonstrate an acceptable excuse” for his or her failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595, 404 N.E.2d 718; see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324; *Tillem v. Cablevision Sys. Corp.*, 38 A.D.3d 878, 832 N.Y.S.2d 296).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and “should only be employed when there is no doubt as to the absence of triable

issues” (*Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853). Consequently, a court’s function on a motion for summary judgment is “not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Kolivas v. Kirchoff*, 14 A.D.3d 493, 493, 787 N.Y.S.2d 392). In making this determination, the evidence must be viewed in the light most favorable to the non-moving party (*Pearson v. Dix McBride*, 63 A.D.3d 895, 883 N.Y.S.2d 53, 53), and inferences that may be drawn therefrom must be accepted as true (*Dykeman v. Heht*, 52 A.D.3d 767, 769, 861 N.Y.S.2d 732).

In support of the motion, Securitas and Jarett have submitted: 1) a copy of the contract between Securitas and Manhattanville College; and 2) the affidavit of William R. Webb, branch manager of defendant Securitas’s Hamilton Avenue, White Plains, New York office. In his affidavit, Mr. Webb alleges that he is the branch manager, that Securitas was retained by Manhattanville College to provide unarmed guard services at its Purchase, New York campus, and that “upon information and belief,” the contract does not require Securitas to “assume protection of third-parties [sic] to the Contract.” Insofar as he asserts no contractual obligation to third parties exists, Mr. Webb’s affidavit is not based upon personal knowledge and, therefore, is insufficient as a matter of law (CPLR §3212[b]; see *Republic Western Ins. Co. v. RCR Builders*, 268 A.D.2d 574, 702 N.Y.S.2d 609; *Republic Natl. Bank of N.Y. v. Luis Winston*, 107 A.D.2d 581, 483 N.Y.S.2d 311).

Securitas and Jarett further rely on the provisions of the contract itself in support of their contention that no duty of care was owed to plaintiff. Specifically, they argue

that the contract contains no expression of intent to confer a mutual benefit on members of the general public (see *Duff v. Grenadier Realty Corp.*, 247 A.D.2d 577, 668 N.Y.S.2d 504; *Hering v. New York Yankees*, 166 A.D.2d 253, 560 N.Y.S.2d 455; *Buckley v. L.B.I. Security Serv.*, 157 A.D.2d 645, 549 N.Y.S.2d 744; *Bernal v. Pinkerton's, Inc.*, 52 A.D.2d 760, 382 N.Y.S.2d 769, *affd.* 41 N.Y.2d 938, 394 N.Y.S.2d 638, 363 N.E.2d 362). Plaintiff argues that until depositions have been conducted and documents have been produced, the motion for summary judgment is premature (see CPLR §3212[f]).

Section 4 of the contract between Securitas and Manhattanville College contains the "Description of Duties" for the site manager, shift supervisor, desk sergeant, roving patrols security officers, and the main gate security officer. Of particular import to the instant motion are the portions of this section describing the duties and responsibilities of the shift supervisor and roving patrol officers.

The portion of the contract describing the duties of the "shift supervisor" states that the individual occupying the position "must possess good interpersonal skills to be able to resolve issues" with Manhattanville College's faculty, staff, students and visitors, and that the shift supervisor must respond to emergency conditions. The description further states that the duties and responsibilities described were not "all inclusive" and makes reference to a standard operating procedures manual which "covers just about any situation that can come up."

In the section describing the duties and responsibilities of the roving patrol security officer, the contract states that the officer "is the visual insight deterrent to crime and violence" and that these officers are the "first line of defense in cases of

disorder.” The only duties and responsibilities described in this portion are the additional duties of security officers in opening and closing buildings, and the contract refers to other responsibilities of security officers as set forth in the “general orders.”

Generally, the existence of a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party (*Espinal v. Melville Snow Constrs.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120, 773 N.E.2d 485). “Before an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him [or her] from physical injury” (*Kotchina v. Luna Park Hous. Corp.*, 27 A.D.3d 696, 697, 815 N.Y.S.2d 594, quoting *Bernal v. Pinkerton’s*, 52 A.D.2d 760 [internal quotations omitted]).

The evidence presented by defendants themselves creates a triable issue of fact. The allegation in the affidavit of Mr. Webb lacks probative value, and the contract does not specify the duties of the security officers and makes reference to “general orders” which were not submitted in support of the motion (see *Flynn v. Niagara Univ.*, 198 A.D.2d 262, 603 N.Y.S.2d 874). Indeed, the language contained in the contract as set forth above suggests that security personnel were hired to benefit Manhattanville College’s faculty, staff, students and visitors.


Accordingly, it is hereby

ORDERED, that defendant’s motion to dismiss pursuant to CPLR §3211(a)(7) is converted to a motion for summary judgment pursuant to CPLR §3211(c) and that motion is DENIED as premature; and it is further

ORDERED, that the matter is referred to the Compliance Part for a conference to be held on 12-13-10, 2010 at 9:30 a.m. in Room 808, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York.

The foregoing constitutes the opinion and order of the Court.

Dated: White Plains, New York
October 15, 2010


HON. LESTER B. ADLER
SUPREME COURT JUSTICE

MARIN GOODMAN, LLP
Attorneys for Defendants Securitas Security
Services, USA, Inc. And Damon Jarett
500 Mamaroneck Avenue, Suite 501
Harrison, New York 10528
BY: Rodrigo Armand, Jr., Esq.

JERRY I. KLEIN, ESQ.
Attorney for Plaintiffs
445 Hamilton Avenue, Suite 405
White Plains, New York 10601

LAW OFFICES OF SUSAN B. OWENS
Attorneys for Defendant Manhattanville College
140 Grand Street, Suite 707
White Plains, New York 10601
BY: Paul L. Neugebauer, Esq.