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

PRESENT: DORIS LING-COHAN J.S.C.
Justice

PART 36

Bowling

- v -

220 W. 42nd St, LLC et al

INDEX NO. 104717/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for + cross-motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5, 6
Replying Affidavits	7

Cross-Motion: ☑ Yes ☐ No 3, 4

Upon the foregoing papers, it is ordered that this motion by defendant 220 W. 42nd St, LLC & ISK Manhattan Inc. the + cross-motion by defendant Security USA, Inc. are decided in accordance with the attached memorandum decision

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/8/11

DORIS LING-COHAN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 36

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NICHOLAS BOWLING and ROY G. BARTON III,

Plaintiffs,

Index No.: 104717/09

-against-

Motion Seq. No.:001

220 W. 42ND ST., LLC, ISK MANHATTAN INC., SECURITY USA, INC. and JOHN DOE a/k/a GUARD NO. 1,

DECISION

Defendants.

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DORIS LING-COHAN, J.:

BACKGROUND

Defendant 220 W. 42nd St, LLC and ISK Manhattan Inc. (together, 220) move, pursuant to CPLR 3211 (a) (5) and/or (a) (7), to dismiss plaintiffs' second amended complaint as against them, with prejudice. Defendant Security USA, Inc. (Security) cross-moves, pursuant to CPLR 3211 (a) (7) to dismiss plaintiffs' second amended complaint as against it, with prejudice.

According to the second amended complaint, this action was instituted to remedy alleged discrimination under the New York State Human Rights Law, and New York Executive Law § 296 *et seq.* Plaintiffs, two homosexual males in an open relationship, entered a McDonald's restaurant on November 26, 2008, where they purchased food. Plaintiffs state that, while they were waiting

for their food, they exchanged kisses, and were confronted by two security guards who, allegedly, physically and verbally threatened them. Some patrons of the fast-food restaurant called the police, who shortly arrived at the scene. According to the complaint, a McDonald's employee asked plaintiffs to wait outside, which they did. Another McDonald's employee subsequently brought them their food purchases.

Plaintiffs have asserted three causes of action: (1) discrimination based upon sexual orientation under Executive Law § 296 (2) (a); (2) discrimination based upon sexual orientation under Executive Law § 296 (13); and (3) intentional infliction of emotional distress.

Paragraph 12 of the second amended complaint alleges that the security guards were employed by defendant Security and were acting in their capacity as security guards at the McDonald's restaurant located at 220 West 42nd Street, New York, New York.

220 argues that the only allegation asserted against them in the second amended complaint is that they maintain a principal place of business and/or a McDonald's restaurant at the location where the incident took place. Hence, 220 asserts that plaintiffs have failed to allege any wrongdoing on their part: the only discriminatory acts complained of were allegedly made by two guards who were employed by Security to work at McDonald's. Moreover, 220 asserts that they cannot be held liable for any act

of one of their employees under Executive Law § 296 (2) (a), unless it was aware of the discriminatory action or condoned it, and it cannot be held liable under Executive Law § 296 (13), which is directed to boycotting trade, which is inapplicable to the case at bar. In addition, 220 maintains that the cause of action for intentional infliction of emotional distress asserted as against it is time-barred.

Security, in support of its cross motion, contends that an employer can only be responsible for the discriminatory acts of its employees if it is aware of those acts or condones them. Security states that it was not aware of the guard's actions, nor does it condone them. Security also argues that it cannot be held vicariously liable for the acts of its security guards because the acts complained of do not rise to the level of intentional infliction of emotional distress.

In opposition to 220's motion, plaintiffs assert that McDonald's, as the employer of Security, may be held responsible for the discriminatory acts of its employees or agents if it is either aware of those acts or condones them. Plaintiffs argue that a fact-finder could conclude that 220 was a party to the misconduct by their failure to discipline the guards.

In opposition to Security's cross motion, plaintiffs aver that Security may be considered a party to the guards' actions because the guards were acting in the scope of their employment

capacities at McDonald's, and the words used by the guards were outrageous and intimidating.

In reply, 220 argues that plaintiffs, in their opposition, have failed to cite to any law supporting their arguments, except for one case that concerns employment discrimination, which is not the issue at hand. Additionally, according to 220, plaintiffs do not present any argument regarding 220's statute of limitations' argument concerning the cause of action for intentional infliction of emotional distress, nor do they attempt to demonstrate how they have a claim under Executive Law §296(13).

Security has also submitted a reply,[1] in which it argues that the doctrine of respondeat superior does not apply to situations in which the employee commits an act that is not within the scope of his or her employment, especially when the employee is acting solely for personal motives. Hence, according to Security, it cannot be held liable for the guards' actions pursuant to Executive Law § 296 (2). Additionally, Security contends that the provisions of Executive Law § 296 (13) are inapplicable to the facts of this case, and that the acts alleged fail to meet the standards of a cause of action for the intentional infliction of emotional distress.

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[1] Security's reply was served late but, by stipulation of all of the parties, has been accepted.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> (5) the cause of action may not be maintained because of ... collateral estoppel, ... res judicata, statute of limitations, or statute of frauds; or
>
> * * *
>
> (7) the pleading fails to state a cause of action ...."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

> "the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*, at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d

475 (1st Dept 1996).

Executive Law §296(2)(a)

That portion of 220's motion seeking to dismiss the first cause of action asserted as against them based on an alleged violation of Executive Law § 296 (2) (a) is denied.

Executive Law § 296 (2) (a) states:

> "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, ... to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, military status, sex or martial status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited."
>
> "Under the Executive Law, '[a]n employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it.' Although an employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation, condonation 'contemplates a knowing, after-the-fact forgiveness or acceptance of an offense.' Therefore, only after an employer knows or should have known of the improper conduct can it undertake or fail to undertake action which may be construed as condoning the improper conduct [internal citations omitted]."

Matter of Medical Express Ambulance Corp. v Kirkland, 79 AD3d 886, 887-888 (2d Dept 2010); *Bianco v Flushing Hospital Medical Center*, 54 AD3d 304, 305 (2d Dept 2008).

If an employer fails even to discipline an employee in response to that employee's discriminatory conduct, the employer may be found to have condoned such improper conduct. *Matter of Wal-Mart Stores East, L.P. v New York State Division of Human Rights*, 71 AD3d 1452 (4th Dept 2010)(employer condoned discriminatory acts of employee against a customer by failing to discipline the employee for such acts).

220's primary argument for dismissing plaintiffs' first cause of action asserted as against it is that the complaint fails to specify any discriminatory acts perpetrated or condoned by 220. The court notes that neither 220, nor Security, argue that the act alleged, if true, would not be improper and discriminatory. However, the complaint states that 220 maintains the McDonald's restaurant where the alleged improper conduct occurred, and that the security guards were employed by McDonald's to protect its establishment. 220 never disputes these allegations. The complaint further alleges that defendants either actively participated in the improper conduct or condoned it, and 220 merely denies this, but fails to provide any supporting admissible evidence for this assertion, such as proof of a non-discriminatory policy being in place prior to the

incident (*Matter of Totem Taxi, Inc. v New York State Human Rights Appeal Board*, 65 NY2d 300 [1985]), or discipline of the guards who actually perpetrated the alleged improper conduct (*Matter of Wal-Mart Stores East, L.P. v New York State Division of Human Rights*, 71 AD3d 1452, *supra*). Therefore, looking at the allegations in the complaint in a light most favorable to plaintiffs, the court cannot, at this juncture, positively state that plaintiffs have failed to state a cause of action against 220 based on a violation of Executive Law § 296 (2) (a).

Based on the foregoing, that portion of 220's motion seeking to dismiss plaintiffs' first cause of action asserted as against them is denied.

Executive Law §296(13)

That portion of 220's motion seeking to dismiss plaintiffs' second cause of action asserted as against them based on an alleged violation of Executive Law § 296 (13) is granted.

Executive Law § 296 (13) states:

> "It shall be an unlawful discriminatory practice (i) for any person to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action."

The Court of Appeals stated in Scott v Massachusetts Mutual Life

Insurance Company, 86 NY2d 429, 434 (1995):

> "The statute's specific reference to boycotts, blacklisting and refusals to deal indicates that this subdivision of the Human Rights Law is directed at curbing, in particular, types of business practices that involve the concerted use of economic means to disadvantage the trade or commercial activities of a member of a targeted group."

Id. at 435. Courts have refused to expand the application of Executive Law § 296 (13) to any action that is not accompanied by blacklisting or commercial boycott. *Mehtani v New York Life Insurance Company*, 145 AD2d 90, 91 (1st Dept 1989). In the instant matter, there is no allegation of any attempt by 220 to boycott or blacklist any commercial interest of plaintiffs, even assuming that individuals, rather than trades, would be encompassed by the statute's provisions. Hence, that portion of 220's motion seeking to dismiss plaintiff's second cause of action asserted as against them is granted.

Intentional Infliction of Emotional Distress:

That portion of 220's motion seeking to dismiss plaintiffs' third cause of action for intentional infliction of emotional distress asserted as against them is granted.

A claim for intentional infliction of emotional distress is governed by a one-year statute of limitations. CPLR 215; *Peters v Citibank, N.A.*, 253 AD2d 803 (2d Dept 1998). The incident that is the subject of this litigation occurred on November 26, 2008, and 220 was not named as a party until July 19, 2010 (ISK Manhattan Inc.) and September 23, 2010 (220 W. 42d St., LLC),

more than a year after the occurrence. Moreover, in their opposition, plaintiffs fail to address this argument proffered by 220. Therefore, based on the foregoing, that portion of 220's motion seeking to dismiss plaintiffs' third cause of action asserted as against them is granted as being time-barred.

Balance of the Motions:

That portion of Security's cross motion seeking to dismiss plaintiffs' first cause of action asserted as against it based on a violation of Executive Law § 296 (2) (a) is denied, for the reasons previously stated.

Although Security argues that the doctrine of respondeat superior will not apply to actions of an employee that are not within the scope of his or her employment or are motivated for personal reasons, Security fails to cite to judicial decisions that specifically interpret the provisions of Executive Law § 296 (2). Those cases, referred to above, impose specific obligations on employers when confronted with discriminatory acts perpetrated by their employees, separate and distinct from vicarious liability pursuant to the doctrine of respondeat superior. There is no evidence that Security did not condone the improper actions of the security guards in its employ and, hence, pursuant to the statute, it may be liable for its own inaction.

That portion of Security's cross motion seeking to dismiss plaintiffs' second cause of action asserted as against it based

on a violation of Executive Law § 296 (13) is granted, based on the reasons stated above. This section of the Executive Law is inapplicable to the facts alleged in the instant complaint.

That branch of Security's cross motion seeking to dismiss plaintiffs' cause of action asserted as against it for intentional infliction of emotional distress is granted, for the reasons stated below.

"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 (2d Dept 2009). However, liability will not attach for torts committed by an employee who is acting solely for "personal motives unrelated to the furtherance of the employer's business." *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 (2d Dept 2006). Whether or not a particular act was within the scope of a worker's employment is generally a question for the finder of fact. *Boyd v Fulton Terrace Associate, LLC*, 11 Misc 3d 144(A), 2006 NY Slip Op 50795(U) (App Term, 1st Dept 2006).

However, in order to make out a cause of action for the intentional infliction of emotional distress, a plaintiff must evidence

> "(i) extreme and outrageous conduct, (ii) an intent to cause--- or disregard of a substantial probability of causing--- severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv)

> the resultant severe emotional distress."

Lau v S&M Enterprises, 72 AD3d 497, 498 (1st Dept 2010).

> "This threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, every one has failed because the alleged conduct was not sufficiently outrageous. Those few claims of intentional infliction of emotional distress that have been upheld by this Court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff [internal quotation marks and citations omitted]."

Seltzer v Bayer, 272 AD2d 263, 264-265 (1st Dept 2000).

Courts are reluctant to allow recovery for the intentional infliction of emotional distress absent a showing of a deliberate and malicious campaign. *Herlihy v Metropolitan Museum of Art*, 214 AD2d 250 (1st Dept 1995)(specifically stating that "such a claim requires an allegation of extreme and outrageous conduct which intentionally or recklessly causes the plaintiff severe emotional distress; while the use of racial or ethnic epithets has been found to be deplorable, courts have been reluctant to allow recovery for their use under the banner of intentional infliction of emotional distress absent a "deliberate and malicious campaign of harassment or intimidation").

In the case at bar, plaintiffs allege that plaintiffs

> "were repeatedly and maliciously intimidated by the guards through their use of the slur 'faggot' and the threats made against them, and which forced them out of the McDonald's restaurant included 'faggots aren't allowed in this McDonald's; faggots like you get killed in places like this; I'll kill you faggot, I'll kill you; I'll take you outside and kill your faggot ass;

> and get that faggot shit out of here. Although insulting language intended to denigrate a person may not, in and of itself, rise to the required level of extreme and outrageous conduct, liability may be premised on such expressions where, as here, defendants' campaign of harassment and intimidation is constant."

Opp. Memo, at 7-8.

While use of such slurs is deplorable, as indicated above, courts are reluctant to allow recovery as an intentional infliction of emotional distress, absent a "deliberate and malicious campaign of harassment or intimidation". *Id.* In support of their contention that such slurs were part of a campaign of harassment, so as to meet the requirements to sustain such a cause of action, plaintiffs cite to *Liebowitz v Bank Leumi Trust Company of New York* (152 AD2d 169 [2d Dept 1989]). However, in that case the conduct complained of continued for a period of five years, not the five minutes alleged in the complaint. Repeated slurs spoken on one occasion do not rise to the level of a continued and ongoing campaign of intimidation and plaintiffs have failed to cite cases to the contrary. Based on the foregoing, that portion of Security's cross motion to dismiss the cause of action for intentional infliction of emotional distress asserted as against it is granted.

The court notes that, in their opposition, plaintiffs request, without making a formal motion, that, should defendants'

motions be granted, they be allowed to amend the complaint. However, since plaintiffs have already amended the complaint twice and have not properly moved by notice of motion, or provided a proposed amended complaint, this requested relief is denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of 220 W. 42nd St., LLC's and ISK Manhattan Inc.'s motion seeking to dismiss the first cause of action asserted as against them is denied; and it is further

ORDERED that the branch of 220 W. 42nd St., LLC's and ISK Manhattan Inc.'s motion seeking to dismiss the second and third causes of action asserted as against them is granted and the second and third causes of action are dismissed as against said defendants; and it is further

ORDERED that the branch of Security USA, Inc.'s cross motion to dismiss the first cause of action asserted against it is denied; and it is further

ORDERED that the branch of Security USA, Inc.'s cross motion to dismiss the second and third causes of action asserted against it is granted and the second and third causes of action are dismissed as against said defendant; and it is further

ORDERED that 220 W. 42nd St., LLC and Security USA, Inc. are directed to serve an answer to the complaint within 30 days; and

it is further

ORDERED that by separate order, a preliminary conference is scheduled; and it is further

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

Dated: July 7, 2011

Doris Ling-Cohan, J.S.C.

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