

Rodriguez v D.Y.M.G. Enters., Inc.

2011 NY Slip Op 31966(U)

June 14, 2011

Sup Ct, NY County

Docket Number: 602073/2009

Judge: Jane S. Solomon

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SCANNED ON 6/15/2011

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

PRESENT: JANE B. SCORON

PART 55

Index Number : 602073/2009
RODRIGUEZ, FELIPE
VS.
D.Y.M.G. ENTERPRISES INC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 602 073/09
MOTION DATE 12/13/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the annexed memorandum decision and Order*

*NB 7/25/11 @ 2 pm
appearance set at end*

FILED

JUN 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/14/11

JANE B. SCORON 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 55

-----X
FELIPE RODRIGUEZ,

Plaintiff,

-against-

D.Y.M.G. ENTERPRISES, INC., MELODIA
CORP. and EDUARDO SANCHEZ,

Defendants.
-----X

Index No. 602073/2009

DECISION & ORDER

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SOLOMON, J.:

Plaintiff Felipe Rodriguez (Rodriguez) sues the defendants for injuries suffered in an altercation outside a nightclub. Defendants D.Y.M.G Enterprises, Inc. (DYMG) and Melodia Corp. (together, the Club) move to strike the note of issue on the ground that Rodriguez failed to comply with a Preliminary Conference order, and separately move for summary judgment dismissing the complaint on the ground that Rodriguez has not raised any triable issues of fact. The motions are decided as follows.

"Melodia" is a nightclub located at 154 Post Road in the Inwood neighborhood of Manhattan. DYMGM owns the property and leases it to Melodia Corp, which runs the club. Manuel Garcia (Garcia) is the president of both entities. On November 8, 2008, Rodriguez and his friend were patrons at Melodia. At some time that night, they began arguing with members of the Club's security staff, including defendant Eduardo Sanchez (Sanchez). Rodriguez became unruly and Sanchez forcibly removed him from the club. On the sidewalk directly in front of Melodia, Sanchez and

two other security guards held Rodriguez down and, allegedly, hit him with batons or their fists, then released him (Rodriguez EBT, attached to Motion, Ex. E, p. 77) and told him to leave. Rather than leave, Rodriguez "cursed back at them and F this and I grabbed a bottle, run [sic] across the street and threw it at them" (Id., p. 78), with the intent to hit Sanchez (Id., p. 84). He missed, and the bottle shattered on the sidewalk a foot from Sanchez. In response, Sanchez rushed across the street and tackled Rodriguez, knocking him to the sidewalk and severely injuring his head. Sanchez was arrested, but the charges were dropped. Rodriguez then sued.¹

The Club seeks summary judgment dismissing the complaint against it for the negligent hiring, supervision and training of Sanchez and for breach of the duty to keep patrons safe. It argues that no liability exists because it had no control over the location where Rodriguez was harmed; Sanchez was an independent contractor and the Club is not liable for his actions; and, if Sanchez was an employee, the Club was not negligent in hiring or retaining him because he was duly licensed by the State of New York as a security guard, had worked at the club for over two years, and showed no signs of violent proclivities. In support, they supply Garcia's affidavit and EBT transcript (EBT), and his New York State security guard license

¹ By decision dated December 7, 2009, Sanchez was held in default and Rodriguez was directed to take an inquest against him.

together with IRS 1099 forms issued by Melodia Corp. to Sanchez.

DISCUSSION

As the landlord, DYMG did not hire or oversee Sanchez, nor did it have a duty to keep the Melodia Corp. patrons safe. Rodriguez's argument that DYMG and Melodia Corp are intertwined corporate entities is not borne out; there is no evidence to support a claim to pierce the corporate veil. Accordingly, the motion for summary judgment dismissing the complaint as to DYMG is granted.

With regards to Melodia Corp., Rodriguez argues that it should be vicariously liable for Sanchez's actions (if Sanchez was an independent contractor), and liable for negligent hiring and supervision (if he was an employee). Either way, the Club is not liable for the injuries alleged here.

A. Independent Contractor:

An "employer of an independent contractor is not liable for injury caused to a third party by an act or omission of the independent contractor . . ." (*Wright v. Esplanade Gardens*, 150 AD2d 197, 198 [1st Dept, 1989]). However, where premises are open to the public, the owner has a nondelegable duty "to provide the public with a reasonably safe premises and a safe means of ingress and egress" (*Backiel v. Citibank, N.A.*, 299 AD2d 504 [2nd Dept., 2002]).

First, it is uncontested that the sidewalk across the street from the Club is not the premises of the Club. The Club

has no duty to keep safe property that is not its own.

Notwithstanding this, Rodriguez's other arguments are unpersuasive. To the extent that Rodriguez argues that the Club was unsafe because Sanchez committed a violent act nearby, a landlord only has the duty to take steps to minimize the foreseeable danger from criminal acts when past experience alerts it to the likelihood of criminal conduct on the part of third persons (*Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875 [2001]). There is no evidence that the Club's security had ever previously assaulted its patrons (provoked or not), and the Club was not on notice of the danger of such conduct.

More importantly, Rodriguez does not sue based on any injuries he received prior to the incident that occurred across the street from the Club. Aside from minor abrasions, his verified bill of particulars describes only head injuries suffered after Sanchez tackled him to the ground. These injuries did not occur during the altercation inside or directly outside the club. Rather, they occurred after Rodriguez was released, ran off the Club's premises and became the aggressor by provoking Sanchez to chase after him.

Next, Rodriguez argues that the Club is liable because running a night club is an inherently dangerous activity. An activity is inherently dangerous where "the activity involved is dangerous in spite of all reasonable care" (*Chainani by Chainani v. Board of Educ. of City of New York*, 87 NY2d 370, 381 [1995]).

Running a night club is not inherently dangerous (see e.g., *Gilbert Properties, Inc. v. City of New York*, 33 AD2d 175, 181-2 [1969] [examples of inherently dangerous activities include: demolition of building in a crowded section of a City, transport and use of hazardous materials [chemicals, etc.], and blasting]).

Accordingly, if Sanchez was an independent contractor, the Club cannot be liable for Rodriguez's injuries.

B. Employee

"An essential 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 injury" (*Sheila C. v. Povich*, 11 AD3d 120, 130 [1st Dept., 2004]). Rodriguez has not established that Sanchez had a history of fighting that would put the Club on notice of a propensity for violence.

Rodriguez's argument that Defendants did not adequately inquire into Sanchez's criminal history is unpersuasive. "An employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past" (*Yeboah v. Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept., 2001]).

Under the doctrine of respondeat superior, an employer may be liable for acts of its employees taken in the course and scope of employment (*D'Amico v. Christie*, 71 NY2d 76 [1987]). Sanchez's actions occurred off of the defendants' property, did not involve securing the property, and were provoked by

Rodriguez's own actions directed against Sanchez personally. Sanchez's decision to leave the Club and chase after Rodriguez after he had left the Club is a clear departure from the course and scope of his employment and does not give rise to employer liability (see, *N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251 [2002]). The fact that Garcia was present for at least part of the incident is insufficient to lend credence to the otherwise unsupported claim that he directed Sanchez to assault Rodriguez.

Accordingly, the Club cannot be liable for Rodriguez's injuries if Sanchez was an employee.

All other arguments have been considered and are unavailing.

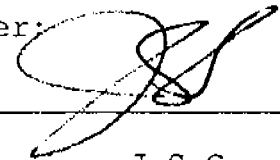
In light of the foregoing, the motion for summary judgment should be granted and the complaint dismissed as against the Club. The motion to vacate the note of issue is moot. Accordingly, it hereby is

ORDERED that the motion to vacate (Sequence 002) is denied as moot; and it further is

ORDERED that the motion for summary judgment (Sequence 003) is granted and the complaint is dismissed as to defendants D.Y.M.G. Enterprises, Inc. and Melodia Corp, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed; and it further is

ORDERED that the inquest against Sanchez shall be on the Part 55 calendar at 2:00 P.M. on July 25, 2011, for the purpose of scheduling the same.

Dated: 6/14, 2011

Enter: 

J.S.C.

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