

Grafov v Chelsea Bicycles Corp.

2012 NY Slip Op 31757(U)

July 2, 2012

Supreme Court, New York County

Docket Number: 110620/08

Judge: Debra A. James

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ALEX GRAFOV,
Plaintiff,

Index No.: 110620/08

Motion Date: 02/10/12

- v -

Motion Seq. No.: 001

CHELSEA BICYCLES CORPORATION and "JOHN DOE"
MANAGER,
Defendant.

FILED

MAR 06 2012

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to ___ were read on this motion/petition for

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

No (s) . 1

Notice of Cross Motion/Answering Affidavits - Exhibits

No (s) . 2, 3

Replying Affidavits - Exhibits

No (s) . 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted and the cross motion is denied.

This action is brought to recover for personal injuries sustained by plaintiff Alex Grafov when he was allegedly assaulted in a bicycle shop owned by defendant Chelsea Bicycles Corporation (Chelsea Bicycles), by the manager of the shop, Daniel Rodriguez (Rodriguez). Plaintiff interposes causes of action against Chelsea Bicycles for assault and battery, on a theory of respondeat superior, and for negligent supervision; intentional infliction of emotional distress; prima facie tort; fraud; and separate "causes of action" alleging a right to

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

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

* 2]
punitive and compensatory damages.

Chelsea Bicycles moves for summary judgment dismissing the complaint as against it, arguing that it has no vicarious liability, under the doctrine of respondeat superior, for the acts of Rodriguez. Plaintiff cross-moves to amend his complaint to allege a "hate crime," and for summary judgment.

The gravamen of plaintiff's claims are that he went into the bicycle shop owned by Chelsea Bicycles on March 2, 2008, to pick up a bicycle which had been brought in previously for repairs by a nonparty. Both Rodriguez, Chelsea Bicycles' manager and Chelsea Bicycles' owner, Rafael Vasquez, were in the shop at the time, as were several other employees. Plaintiff alleges that when he expressed his dissatisfaction with the repairs made to the bicycle, he was assaulted by Rodriguez, when Rodriguez put his arm around plaintiff's neck as plaintiff was leaving the shop. Rodriguez's action allegedly caused plaintiff to fall, and sustain injury to his elbow. Plaintiff claims that the alleged assault was accompanied by anti-gay slurs on the part of Rodriguez. Rodriguez has re-located to Ireland and has not been served with the complaint.

Plaintiff claims that Chelsea Bicycles is liable to plaintiff for Rodriguez's alleged assault on plaintiff, as Rodriguez's employer, under the theory of respondeat superior.

Plaintiff also claims that Rodriguez was negligently hired and supervised by Chelsea Bicycles.

This court shall dismiss plaintiff's claim that defendant negligently hired and supervised Rodriguez as plaintiff has come forward with no evidence of anything in Rodriguez's background that would have placed Chelsea Bicycles on notice that Rodriguez had a propensity for violence. See *Rodriguez v United Transportation Company*, 246 AD2d 178 (1st Dept 1998). The court shall also deny plaintiff's motion to amend the complaint to allege a "hate crime" based on the alleged anti-gay slurs. While plaintiff may file a criminal complaint with law enforcement agencies accusing Rodriguez of violating the penal codes, there is no separate civil cause of action that distinguishes assault based on homosexual animus.

"Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment." *N.X. v Cabrini Medical Center*, 97 NY2d 247, 251 (2002); see also *Bowman v State of New York*, 10 AD3d 315 (1st Dept 2004). "[W]here the assault was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer," vicarious liability will not attach. *Milosevic v O'Donnell*, 89 AD3d 628, 629 (1st Dept 2011),

[*4]
quoting *Yeboah v Snapple, Inc.*, 286 AD2d 204, 204-205 (1st Dept 2001).

Instructive is the case of *Nunez v Caryl & Broadway, Inc.* (30 AD3d 249 [1st Dept 2006]), where the plaintiff was attacked by three men who had been ushered into his apartment by the superintendent of the building, who stood by, but did not participate in the assault. There the plaintiff sought to hold the employer liable for the assault on the basis of respondeat superior, but the court found that there was no evidence that the superintendent acted in the employer's interests, and that any evidence that he was acting in furtherance of his employer's business was "pure speculation." *Id.* at 250.

On the other hand is the case *Ramos v Jake Realty Co.* (21 AD3d 744 [1st Dept 2005]), in which the plaintiff/tenant was assaulted by the building's superintendent when plaintiff attempted to videotape an inspection of the building's fire escape during a rent strike. The Court found that:

[t]here is no evidence that the superintendent had any personal motivation for the assault. His animus, shared by the management, was about the rent strike. In addition, the superintendent assaulted plaintiff in a specific attempt to prevent him from collecting evidence, via the videotaped inspection of the fire escape, to support the tenants' case. Certainly, the [employer's] interests would be furthered by preventing tenants from collecting evidence to support their application for rent abatements.

Id. at 746. Thus, the *Ramos* Court found a question of fact as to whether the superintendent acted within the scope of his employment in committing the assault.

In the present case, there is no evidence that Rodriguez was furthering Chelsea Bicycles' interests in his sudden assault on plaintiff. The only evidence submitted is that he was acting from "purely personal motives" which were an "obvious departure from [his] normal duties," an act which will not be attributed to his employer. *White v Hampton Management Company, L.L.C.*, 35 AD3d 243, 244 (1st Dept 2006); see also *Flowers v New York City Transit Authority*, 267 AD2d 132 (1st Dept 1999).

Finally, as there is no liability, there can be no punitive damages, and the "cause of action" for such damages is dismissed as well. The remainder of plaintiff's claims, including intentional infliction of emotional harm and fraud, are dismissed as without basis. Plaintiff's cross motion to amend the complaint and for summary judgment is denied.

Accordingly, it is

ORDERED that the motion brought by Chelsea Bicycles Corporation for summary judgment is granted, and the action is dismissed with costs and disbursements to this defendant as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the plaintiff's cross motion seeking to amend the complaint and for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: July 2, 2012

ENTER:

~~_____~~
DEBRA A. JAMES J.S.C.
J.S.C.

FILED
JUL 06 2012
NEW YORK
COUNTY CLERK'S OFFICE