

Herskovitz v Equinox Holdings, Inc.

2013 NY Slip Op 31193(U)

June 3, 2013

Sup Ct, NY County

Docket Number: 151065/2013

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 151065/2013
HERSKOVITZ, KEIKO
vs
RELATED COMPANIES, L.P.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

In accordance with the accompanying memorandum decision, it is hereby

ORDERED that plaintiff Keiko Herskowitz's complaint against defendant Equinox Holdings, Inc. is dismissed in its entirety; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the court.

Dated: 6/3/13

[Signature] J.S.C.
HON. CAROL EDMEAD

- 1. CHECK ONE: [X] 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
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
KEIKO HERSKOVITZ,

Plaintiff,

Index No.: 151065/2013

-against-

DECISION AND ORDER

EQUINOX HOLDINGS, INC.,

Motion sequence #001

Defendant.

-----X
CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Plaintiff Keiko Herskovitz (“plaintiff”) alleges that she was subjected to a sexual assault by a lewd act committed by an employee of the defendant Equinox Holdings, Inc. (“defendant”).

Defendant moves to dismiss plaintiff’s complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action.

Background Facts

According to plaintiff, she was meditating in a yoga class at a defendant’s yoga studio, when she heard someone walk into the room; when she opened her eyes, she saw the studio’s maintenance worker masturbating within two feet from her (the “incident”). When she asked the maintenance worker "what are you doing?!" he quickly covered himself with a yoga blanket and hurried out of the room (Complaint ¶10). Plaintiff immediately reported the incident to the studio’s supervising manager on that day Emily Daly (“Daly”), who responded that she would "look into it" (¶11). Approximately an hour later, plaintiff saw the same maintenance worker walking down the hall and returned to the manager's office to inquire of what actions the studio was taking to protect its clients’ safety. Daly apparently did not believe plaintiff’s story and said

the maintenance worker was a good employee. Plaintiff then reported the incident to the local police precinct. Plaintiff brought this action against defendant¹ alleging causes of action for negligent hiring, employer liability for employee act, negligence, respondeat superior, vicarious liability, assault, and both intentional and negligent infliction of emotional distress.

In support of its motion to dismiss, defendant argues that plaintiff failed to allege a legally cognizable duty which was allegedly breached by defendant, so as to impose any liability on defendant.

Plaintiff's *second, fourth, fifth, and sixth* causes of action, all of which seek to impose liability on defendant for its employee's alleged *acts and assault*, on the theory of vicarious liability or the doctrine of *respondeat superior*, must be dismissed because the maintenance worker's inappropriate sexual conduct was beyond the scope of his employment duties, not committed in furtherance of defendant's yoga studio business.

Further, plaintiff's *first and third* causes of action alleging *negligence and negligent hiring* must be dismissed based on the absence of allegations that defendant was aware of the maintenance worker's propensity for lewdness or other inappropriate sexual acts in front of patrons, or that defendant had the opportunity to control or deter the maintenance employee from performing such acts. There is no allegation of prior complaints or indication of any prior similar incidents.

¹ The record indicates that plaintiff first commenced this action against The Related Companies, L.P., but thereafter amended her complaint to name only Equinox Holdings, Inc. as a defendant. Equinox's counsel indicates that although Equinox has not been formally served either with the Complaint or the Amended Complaint, given the fact plaintiffs' allegations attracted press coverage, it decided to move for dismissal. According to defendant, a few days after the alleged incident, plaintiff's counsel made a statement to the New York Post that he had hired a private investigator to gather facts in support of plaintiff's claim.

Furthermore, the incident was unforeseeable. Even if defendant had a duty to provide plaintiff with the environment free from sexually or otherwise offensive conduct, the maintenance worker's lewd act was not within the category of foreseeable risks, against which defendant had a duty to protect plaintiff. And, defendant had no duty to investigate, unless it knew of facts that would lead a reasonably prudent employer to investigate the employee. In any event, the potential foreseeable risk of not supervising a maintenance worker is not that the worker may potentially masturbate in front of a member, but that he may injure himself or others while performing his cleaning maintenance tasks.

Plaintiff likewise fails to state claims for *intentional* and *negligent infliction of emotional distress*. As to the intentional infliction of emotional distress, there are no allegations that defendant (health club) engaged in "extreme" and "outrageous" conduct. Instead, the complaint solely addresses the conduct of the "defendant's employee" who is not named as a defendant in this suit, and is not an officer or director of the corporation. And again, defendant's employee was not acting within the scope of his employment during the incident so as to impose vicarious liability upon defendant for such claim. And, plaintiff's allegations in her *negligent infliction of distress* claim that "Defendant breached the duty of care they owed to Plaintiff by allowing the maintenance worker to masturbate in Plaintiff's presence, causing her to fear for her own safety" (Amended Complaint, ¶39), are premised on the same allegations as in the claim for *negligent supervision*. And, there are no allegations that defendant was aware of the danger that the maintenance employee would perform a sexually lewd act in its premises, or that it had the opportunity to prevent him from doing so.

In opposition, plaintiff contends that her complaint adequately states all causes of action.

As a business owner, defendant has a duty to prevent harm to those on its property. Defendant was negligent in that it failed to provide plaintiff with reasonably safe environment by failing to “monitor” and “manage” its maintenance staff and by “allowing close-door, one-on-one encounters between customers and maintenance staff” (memorandum in opposition, p. 5). Plaintiff was a paying customer on defendant’s premises, when defendant’s employee assaulted her, proximately causing her injury.

Further, the foreseeability analysis does not determine the existence of a duty in the negligence context; it only circumscribes the boundaries of a duty after it has been established that the duty exists. Defendant’s arguments relate to the summary judgment standard, which is inapplicable at this stage of the litigation.

Plaintiff further contends she has alleged sufficient facts to support her claims against defendant under a theory of *respondeat superior*. An employer maybe held liable even for unauthorized actions of its employee. The Amended Complaint alleges that defendant's employee assaulted plaintiff while he was performing a task that his employer hired him to do - cleaning the yoga studio. Furthermore, whether the subject maintenance employee acted within the scope of employment is a question of fact, and not the one of law for the court to decide.

As to the negligent hiring claim, while plaintiff has no knowledge of whether the subject maintenance worker had propensity for lewdness, the notice element of this claim has been satisfied when plaintiff told defendant about the incident. And, defendant’s failure to investigate the incident *after* plaintiff complained about defendant’s employee amounts to negligent hiring. Plaintiff also argues that by “scoffing” at her complaint on the day of the incident, defendant in essence “ratified [or] endorsed” the behavior of its employee.

Further, plaintiff adequately pleaded the emotional distress claims. The extreme conduct, *i.e.*, the sexual assault by defendant's employee, caused plaintiff's severe emotional distress, which was exacerbated by defendant's subsequent refusal to take action against that employee and defendant's [attitude] and disregard to plaintiff's well being.

In reply, defendant argues that liability may not attach for *unauthorized* employee's acts, which the employer could not have reasonably anticipated. And, the *respondeat superior* doctrine does not apply even if the employer did not discipline its employee *after* conducting an internal investigation, since the employee's alleged offensive conduct fell outside the scope of his employment.

Further, plaintiff's report to defendant's manager *after* the incident does not constitute requisite notice in a *negligent hiring* claim, as it must indicate an employer's *prior* knowledge of an employee's propensity for the offensive behavior in question, *i.e.*, *before* the incident occurs.

Plaintiff also failed to establish that further discovery may reveal any evidence of egregious conduct necessary to sustain her claim for *negligent hiring*. Plaintiff admits that she has no knowledge as to whether the maintenance worker in question had a propensity to commit lewd acts. Her alleged need for discovery is speculative and plaintiff does not submit an affidavit. Instead she seeks to proceed with a hypothetical claim based on a mere surmise that helpful facts might emerge later. Plaintiff should not be permitted to engage in a speculative "fishing expedition" to obtain hoped-for disclosure.

Further, plaintiff's *negligence* claim cannot be sustained as there is no legal duty to prevent a maintenance worker from merely "entering a room" or to "protect its clients from one-on-one, closed door encounters with its maintenance staff."

And, the *emotional distress* claims cannot be sustained because, even if defendant's initial response was perceived by plaintiff as insensitive, it does not constitute "extreme and outrageous conduct" required for these claims. According to plaintiff's own assertion, defendant assured her that management was taking the situation very seriously. Plaintiff cites no case law in support of her emotional distress claim based solely on the alleged "scoffing" at a complaint of injury.

Defendant adds that plaintiff's "invented" duty on the part of defendant, to prevent "one-on-one encounters" between patrons and maintenance staff, has no support in law, as there is no employer's liability for "failure to chaperone a maintenance employee," or "to isolate club members from maintenance staff."

That the incident was unforeseeable is supported by plaintiff's own allegation that during the three-year membership at the yoga studio, plaintiff admittedly regularly meditated alone after the class, without an incident. Thus, even if defendant, as an employer, had an opportunity to control the maintenance worker, there is no allegation that defendant was aware of any such need to control him.

Discussion

On a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211 (a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference (*see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, allegations which fail to state a viable cause of action, that consist of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*Leder v Spiegel*,

31 AD3d 266, 819 NYS2d 26 [1st Dept 2006]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]). The court's inquiry is limited to determining whether the complaint states any cause of action, not whether there is evidentiary support for it (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]).

*Respondeat Superior and Vicarious Liability*²

“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 (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933, 693 NYS2d 67 [1999]; *Riviello v Waldron*, 47 NY2d 297, 302, 418 NYS2d 300 [1979]). Thus, an “employer may be held liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment” (*Judith M. v Sisters of Charity Hosp.*; *Riviello v Waldron*). However, liability will not attach for torts committed by an employee who is acting solely for personal motives, not in furtherance of the employer's business (*N.X. v Cabrini Medical Center*, 97 NY2d 247 [2002]; *Judith M. v Sisters of Charity Hosp.*; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600, 815 NYS2d 107 [2d Dept 2006]).

New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context (*Taylor v United Parcel Serv, Inc.*, 72 AD3d 573, 899

² The second cause of action entitled "Employer Liability for Employee Act" alleges that defendant, as the employer of the maintenance worker, is liable for its employee's "unlawful act, which was done within the scope of his authority" in cleaning up after yoga class, is essentially identical to her claims of vicarious liability and *respondeat superior*.

NYS2d 223 [1st Dept 2010][no vicarious liability for injuries sustained by plaintiff as a result of a sexual assault upon her by UPS's employee when he was making a delivery to her apartment]; *RJC Realty Holding Corp. v Republic Franklin Insurance Company*, 2 NY3d 158 [2004] [plaintiff beauty salon/health spa not vicariously liable for the alleged sexual assault of a massage client by a masseur employed by plaintiff]; *N.X. v Cabrini Medical Center*, 97 NY2d 247 [2002][a “sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives”)].

In *Judith M.*, the Court of Appeals rejected a claim of a hospital’s vicarious liability for the sexual assault of a patient perpetrated by an orderly who was assigned to bathe her, holding that the employee “departed from his duties for solely personal motives unrelated to the furtherance of the Hospital’s business” (*Judith*, at 933).

Likewise, in *Cabrini*, the Court refused to hold Cabrini Medical Center vicariously liable for a sexual assault of a patient recovering from the effects of anaesthesia by one of its residents, who was not listed on the plaintiff’s chart. Comparing the *Judith M.* case, the Court noted that *Cabrini* presented “an even more compelling basis for dismissal of the vicarious liability claims than *Judith M.*,” because unlike the employee in *Judith M.* who committed a sexual assault while engaged in his assigned duties, in *Cabrini*, the defendant resident was not charged with plaintiff’s care.

Similarly here, the maintenance employee, assigned to clean the room after a yoga class, was not charged with plaintiff’s care; and, assuming plaintiff’s allegations are true, it is clear that the alleged lewd act by the employee was not in furtherance of the yoga studio’s business and was

a clear departure from his cleaning duties, having been committed for solely personal motives (*Judith M. v Sisters of Charity Hosp.*; *N.X. v Cabrini Medical Center*, 97 NY2d 247). Thus, the employee's alleged lewd act was, as a matter of law, not within the scope of his employment.

Nor was such act generally foreseeable (*N.X. v Cabrini Medical Center* [a sexual assault of a patient by a physician with no history of sexual misconduct may be so remote a risk as to never be reasonably foreseeable]), as there is no allegation or indication that the subject employee had previously demonstrated inappropriate sexual behavior.

Plaintiff's reliance on *Riviello v Waldron* (*supra*), for the proposition that defendant should be held vicariously liable even though the maintenance worker's act was unauthorized, is misplaced. In that case, the conduct of a restaurant cook, who was engaged in a friendly conversation with a customer, flipping a pocket knife, was found to be *within* the scope of his employment when the knife accidentally struck the customer. The Court of Appeals pointed out that

“[a]mong the factors to be weighed [in determining whether the tortious conduct of a particular employee was within the scope of employment] are: the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; *whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated.*” (Emphasis added).

The Court went on to hold that the fact that the employee, “at the precise instant of the occurrence, was not plying his skills as a cook [. . .] did not take him beyond the range of things commonly done by such an employee,” as it was expected that by the nature of his profession, he would take pauses and engage in casual conversations with customers and on occasion, exhibit to others the objects he wears or carries (*Riviello v Waldron*, at 304). None of these factors are

present here, as to bring the maintenance employee's act within the scope of employment.

To the extent that the complaint alleges that defendant is "vicariously liable for [the employee's] assault," and since the maintenance employee's act was not within the scope of employment, defendant as employer cannot be held vicariously liable for the alleged sexual assault of its employee as a matter of law (*see RJC Realty Holding Corp.*, 2 NY3d at 164, *supra*; *Chunnulal v Rosen*, 2007 WL 3128375 (Trial Order) [Sup Ct, New York County 2007])[hospital was not vicariously liable for sexual assault committed by its employee upon hospital visitor, where such assault was not committed in furtherance of hospital's business interest, was not within scope of employee's employment, and was committed solely for personal motives]).

Further, plaintiff's separate cause of action seeking to hold defendant liable for its employee's "assault" is inadequate in any event. To plead a such a cause of action, plaintiff must allege the intentional placing of another in apprehension of imminent harmful or offensive contact (*Tom v Lenox Hill Hosp.*, 165 Misc 2d 313 [Supreme Court New York County 1995], *citing* PJI 3:2; *Holtz v Wildenstein & Co.*, 261 AD2d 336, 693 NYS2d 516 [1st Dept 1999]; *Jaffe v National League for Nursing*, 222 AD2d 233, 635 NYS2d 9 [1st Dept 1995]). "An action for an assault need not involve physical injury, but only a grievous affront or threat to the person of the plaintiff" (*Gould v Rempel*, 99 AD3d 759, 951 NYS2d 677 [2d Dept 2012]).

Plaintiff's conclusory allegations that defendant's employee "intentionally placed [plaintiff] in apprehension of imminent offensive contact by masturbating next to her," are insufficient. Notably, the court's research has found no cases in this or other departments, and plaintiff does not cite to any, imposing liability for an assault solely based on the act of

masturbation performed in front of another person.³ Thus, the cause of action for assault must be dismissed.

Therefore, since the maintenance employee's offensive sexual act was not within the scope of his employment, *the second, fourth, fifth, and sixth causes of action*, all of which seek to hold defendant vicariously liable for its employee's act, are dismissed.

Intentional and Negligent Infliction of Emotional Distress

Plaintiff's pleadings are also insufficient to support her intentional and negligent infliction of emotional distress claims.

The elements of a cause of action for *intentional* infliction of emotional distress are extreme and outrageous conduct; intent to cause severe emotional distress; a causal connection between the conduct and the injury, and severe emotional distress (*Graupner v Roth*, 293 AD2d 408, 742 NYS2d 208 [1st Dept 2002], *citing Howell v New York Post Co.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]; Restatement [Second] of Torts § 46 [1]). The "requirements of the rule are rigorous, and difficult to satisfy" (*Howell v New York Post Co.*). Thus, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.*, *citing Murphy*, 58 NY2d 293, 303, 461 NYS2d 232 [1983], *quoting* Restatement [Second] of Torts § 46, comment d; *Sheila C. v Povich*, 11 AD3d

³ The court notes that an act of masturbating in public is punishable under New York Penal Law. Pursuant to subdivision *a* of Penal Law § 245.00, a person is guilty of public lewdness when he or she intentionally exposes the private or intimate parts of his or her body in a lewd manner or commits any other lewd act in a public place, or "in private premises under circumstances in which he or she may readily be observed from either a public place or from other private premises, and with intent that he or she be so observed" (NY Penal L § 245.00). In enacting this subdivision of the public lewdness statute, the Legislature apparently sought to protect the public, "unsuspecting, unwilling, nonconsenting, innocent, surprised or likely-to-be-offended or corrupted types of viewers from the sight of offensive activities and materials" (*People v McNamara*, 78 NY2d 626, 631, 578 NYS2d 476 [1991]).

120, 781 NYS2d 342 [1st Dept 2004]).

Alternatively, a *negligent* infliction of emotional distress claim may be premised on the allegation of the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety (*Sheila C. v Povich, supra, citing Dobinsky v Rand*, 248 AD2d 903, 670 NYS2d 606 [1st Dept 1998]). “Where endangerment of physical safety is pleaded, the physical danger supporting a negligent infliction of emotional distress claim involves direct and immediate jeopardy, not a danger later arising as a consequence of a defendant's action” (*see Peters v Rome City School Dist.*, 298 AD2d 864, 866, 747 NYS2d 867 [4th Dept 2002]). And, the same legal standard [of extreme and outrageous conduct] is also generally applicable to *negligent* infliction of emotional distress claims (*Sheila C. v Povich*, 2 Misc 3d 315, 768 NYS2d 571 [Sup Ct, New York County 2003], *aff'd as modified on other grounds*, 11 AD3d 120, 781 NYS2d 342, *citing Longo v Armor Elevator Co., Inc.*, 307 AD2d 848, 850, 763 NYS2d 597 [1st Dept 2003]; *Dillon v City of New York*, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]).

At the outset, the intentional infliction of emotional distress claim does not allege any conduct undertaken by defendant. Plaintiff merely claims that “Defendant’s *employee* intentionally engaged in extreme and outrageous conduct intended to cause severe emotional distress” to plaintiff, and that his “behavior was the nexus between the conduct and the injury which caused” plaintiff severe emotional distress. Thus, as there are no allegations directed as defendant, the seventh cause of action fails to state a cause of action.

Neither does the allegation in the negligent infliction of emotional distress claim, that defendant “breached the duty of care they owed Plaintiff by allowing the maintenance worker to

masturbate in Plaintiff's presence, causing her to fear for her own safety," indicate a conduct by defendant "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342, *supra*, citing *Murphy*, 58 NY2d 293, 303, 461 NYS2d 232), so as to support the cause of action for negligent infliction of emotional distress.

Further, the facts alleged by plaintiff in opposition, that defendant "scoffed" at plaintiff's report of the incident and failed to immediately terminate the offending employee, or that her emotional distress was caused or exacerbated by "[d]efendant's failure to [. . .] investigate the allegations [. . .] and their cavalier disregard for her wellbeing," simply do not rise to the level of "extreme and outrageous" conduct necessary to sustain the negligent (or intentional) infliction of emotional distress claims.

Therefore, the *seventh and eighth* causes of action are dismissed.⁴

Negligent Hiring

In those instances where an employer cannot be held vicariously liable for torts committed by its employee [as beyond the scope of his employment], the employer can be held liable under theories of negligent hiring and negligent retention (*Sheila C. v Povich*, 11 AD3d

⁴ Plaintiff does not specifically allege that defendant is liable for its employee's intentional or negligent infliction of emotional distress under a theory of vicarious liability or *respondeat superior*. However, to the degree plaintiff asserts such claims, defendant cannot be held liable for the maintenance employee's actions for the reasons stated above (*Suarez v Bakalchuk*, 66 AD3d 419, 887 NYS2d 6 [1st Dept 2009][affirming dismissal of emotional distress claim against defendant hospital under the theory of *respondeat superior* where the hospital's doctor included vulgar language on the discharge form, since the doctor was acting outside the scope employment; thus, the hospital could not be held liable for the doctor's actions]; see *Spielman v Carrino*, 77 AD3d 816, 910 NYS2d 105 [2d Dept 2010][sisters who alleged that former pastor at church engaged in secret, sexual affairs with both of them could not hold church vicariously liable under doctrine of *respondeat superior* for intentional infliction of emotional distress since former pastor committed alleged acts while acting outside scope of his employment]).

120, 781 NYS2d 342, citing *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161, 654 NYS2d 791 [2d Dept 1997], *lv dismissed* 91 NY2d 848, 667 NYS2d 683, *cert. denied* 522 US 967, 118 SCt 413 [1997]; Restatement [Second] of Torts § 317).

A necessary element of a cause of action alleging negligent hiring is that “the employer knew or should have known of the employee's propensity for the conduct which caused the injury” (*Detone v Bullit Courier Serv, Inc.*, 140 AD2d 278, 279 [1988], *lv denied* 73 NY2d 702 [1988]; *Sheila C. v Povich*, 11 AD3d 120; *see also*, 37 NY Jur, Master and Servant, §164).

Plaintiff alleges in the Amended Complaint that defendant “knew or should have known of [the employee’s] propensity to commit injury” and therefore was negligent in hiring him. Such conclusory allegations, even if deemed to be true, are insufficient to support the negligent hiring claim (*see Naegele v Archdiocese of New York*, 39 AD3d 270, 833 NYS2d 79 [1st Dept 2007]; *Krystal G. v Roman Catholic Diocese of Brooklyn*, 34 Misc 3d 531, 933 NYS2d 515 [Sup Ct New York County 2011])[negligent hiring claim insufficiently pleaded since plaintiffs alleged no factual scenario allowing an inference that at the time of the hiring, Roman Catholic diocese and school [the employer] should have known that the employee would present a sexual threat to the students at the school]; *cf Saggese v Bacigalupo*, 2007 WL 3234725 [Supreme Court, New York County 2007][claim for negligent hiring of an employee who struck and injured plaintiff, survived a motion to dismiss, as it alleged that the defendants “knew or should have known of the employee’s propensity for anger, belligerency, and violence”]).

Indeed, plaintiff fails to allege any facts from which one could infer that defendant knew or should have known of the maintenance worker’s propensity to commit a lewd act, or that anything transpired before the incident in question to alert defendant to the possibility that such

an incident might occur (*see Kenneth R. v Roman Catholic Diocese of Brooklyn, supra*).

Furthermore, there is no common-law duty to institute specific procedures for hiring employees, unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee (*see, Kenneth R., supra; Yeboah v Snapple, Inc.* 286 AD2d 204, 729 NYS2d 32 [1st Dept 2001])[employer was under *no* duty to inquire as to whether its employee who assaulted plaintiff delicatessen's owner, had criminal convictions in the past]).

Plaintiff also failed to establish that additional discovery is necessary (CPLR 3211[d]; *Sheila C. v Povich*, 11 AD3d 120, *citing Rovello v Orofino Rlty. Co., Inc.*, 40 NY2d 633, 635, 389 NYS2d 314 [1976]). Dismissal of the claims cannot be avoided by speculation as to what discovery might reveal (*Milosevic v O'Donnell*, 89 AD3d 628, 934 NYS2d 375 [1st Dept 2011], *citing Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258, 855 NYS2d 64 [1st Dept 2008]). Plaintiff's alleged need for discovery, which *may* reveal evidence of the prior incidents or other facts necessary to sustain her claim for negligent hiring, is speculative as it is unsupported by the allegations in the complaint and plaintiff does not submit an affidavit (*see* CPLR 3211(d); *Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept 2012]).

Therefore, the *first* cause of action for negligent hiring is dismissed.

Negligence

Plaintiff's allegations are likewise insufficient to support her negligence claim.

To state a cause of action for negligence, plaintiff must allege the existence of a duty, breach of that duty, injury to plaintiff resulting therefrom and damages (*see Benjamin v City of New York*, 99 AD2d 995 [1st Dept 1984]).

The threshold question in any negligence claim is whether the alleged tortfeasor owes a duty of care to the injured party (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]; *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]), and the existence and scope of that duty is a legal question for the courts to determine (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 288 [2001]; *Echorst v Kaim*, 288 AD2d 595, 596 [3d Dept 2001]). Indeed, “[i]n the absence of duty, there is no breach and without a breach there is no liability” (*Pulka v Edelman*, 40 NY2d 781, 782, 390 NYS2d 393 [1976]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 562 [2d Dept 2003]; *Petito v Verrazano Contr. Co., Inc.*, 283 AD2d 472, 474 [2d Dept 2001]).

Moreover, “foreseeability [. . .] generally presents a factual question and does not determine the existence of duty, but, rather, the scope of that duty, *once it is determined to exist*” (*Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342, *citing Eiseman v State of New York*, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *Pulka v Edelman*, 40 NY2d at 785; *Petrosky v Brasner*, 279 AD2d 75, 78 [1st Dept 2001], *lv denied* 96 NY2d 711 [2001]).

Here, plaintiff alleges that defendant as a property owner and employer, owed her a duty “to be free from harassment and offensive conduct” and that it failed to monitor and “manage” its maintenance staff by “allowing close-door, on-on-one encounters between customers and maintenance staff” (Complaint, ¶¶20 - 23; memorandum in opposition, p. 5).

It is undisputed that an owner or possessor of land has a common-law duty to maintain the public areas of the property in a reasonably safe condition for those who use it (*Williams v Citibank, N.A.*, 247 AD2d 49, 677 NYS2d 318 [1st Dept 1998], *citing Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519, 429 NYS2d 606 [1980]). In particular, landowners have a duty to

control the conduct of third persons on their premises when they have the opportunity to control such persons *and are reasonably aware of the need for such control* (*D'Amico v Christie*, 71 NY2d 76, 518 NE2d 896 [1987])[emphasis added]). However, an “owner or possessor is not an insurer of the safety of those who use the premises and cannot be held to a duty to take protective measures *unless it is shown that he knows or, from past experience, has reason to know that there is a likelihood of third-party conduct likely to endanger the safety of those using the premises*” (*Williams, citing Nallan, supra*, at 519, 429 NYS2d 606 and Restatement [Second] of Torts § 344, comment f [the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults])[emphasis added]).

A duty to control the conduct of others arises only where a special relationship exists, either “between defendant and a third person whose actions expose plaintiff to [the alleged harm]; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others” (*Avins v Federation Employment and Guidance Service, Inc.*, 52 AD3d 30, 857 NYS2d 550 [1st Dept 2008], *citing Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 530 NYS2d 513 [1988]).

It has been held that “[i]n fixing the orbit of duty, an often difficult task, the courts must bear in mind the precedential and consequential effects of their rulings” and “limit the legal consequences of wrongs to a controllable degree” (*Sheila C. v Povich*, at 126 [citations omitted]). The Court of Appeals observed in *Palka v Servicemaster Mgt. Servs. Corp.* (83 NY2d 579, 611 NYS2d 817 [1994]), that courts traditionally “fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation,

and public policies affecting the expansion or limitation of new channels of liability” (83 NY2d 579, 611 NYS2d 817).

In *Cabrini, supra*, the First Department held that while “[a] hospital has a duty to safeguard the welfare of its patient, [this] sliding scale of duty is limited [and] it does not render a hospital as insurer of patient safety or require it to keep each patient under constant surveillance” (*Cabrini, citing Kileen v State of New York*, 66 NY2d 850, 851, 498 NYS2d 358 [1985]). “As with any liability in tort, the scope of such duty is circumscribed by those risks which are reasonably foreseeable” (*id.*, at 253)(citations omitted). Thus, the *Cabrini* court found a duty based on “actually observed or readily observable misconduct committed in the very presence of the hospital employees,” *i.e.*, nurses, who were in close proximity to plaintiff’s bed and were generally aware of the offending employee’s presence.

Here, as noted, the maintenance employee’s lewd conduct was not reasonably foreseeable, as there is no allegation or indication of any prior instances of the employee’s inappropriate sexual behavior (see *N.X. v Cabrini Medical Center* [a sexual assault of a patient by a physician with no history of sexual misconduct may be so remote a risk as to never be reasonably foreseeable]; see also *Cornell v State of New York* 46 NY2d 1032, 416 NYS2d 542 [1979][no hospital liability because risk of sexual assault by attendant with clean record not foreseeable]). Nor there are any allegations, like in *Cabrini*, that there were “acts or events” alerting defendant that a sexual assault or other inappropriate act was about to take place (*cf N.X. v Cabrini Medical Center*, at 253).⁵ Thus, the pleadings do not set forth any facts that defendant

⁵ Plaintiff’s unsupported assertion that her complaint to the club *after* the incident constitutes notice lacks merit.

was aware of any need to control the subject maintenance employee (*see D'Amico v Christie*, 71 NY2d 76, 518 NE2d 896, *supra*).

Alternatively, plaintiff, pointing to *Riviello* (*supra*) urges that the employment relationship itself additionally gives rise to a duty on the part of defendant as employer to control the conduct of its employee even *outside* the scope of employment, asserting that defendant had a duty to “monitor its maintenance staff” and prohibit “close-door, one-on-one encounters between customers and maintenance staff.”

That duty, however, as based on the factors set forth in *Riviello*, is limited to specific acts, which “the employer could reasonably have anticipated” (*see Riviello, supra*, at 303). And, plaintiff cites no law in support of her position that, in the absence of the knowledge of the employee’s propensities to commit a lewd act, the employer has a duty to control the conduct of its employee acting *outside* the scope of employment.

Furthermore, the Second Department case *Miglino v Bally Total Fitness of Greater New York, Inc.* (92 AD3d 148 [2d Dept 2011]), on which plaintiff relies, is distinguishable. In that case, a health club employee, who came to an assistance of a club member who suddenly collapsed while playing racquetball, failed to use an available automated external defibrillator. The court, relying on the well-established principle that “one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully,”⁶ held that the club employee “assumed a duty by coming to the decedent’s assistance.”

Unlike in *Miglino*, here, the complaint contains no facts which would support an

⁶ *Miglino*, citing *Mirza v Metropolitan Life Ins. Co.*, 2 AD3d 808, 809, 770 NYS2d 384 [2d Dept 2006], quoting *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 522, 429 NYS2d 606 [1980]).

assumption of duty by defendant's employees. Thus, "[i]n the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman, supra*). Therefore, the *third* cause of action for negligence is dismissed.

Conclusion

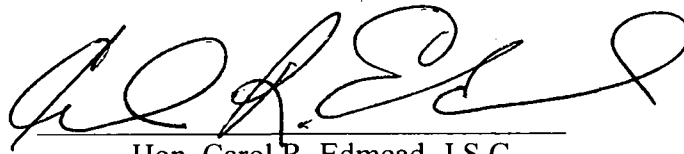
Based on the foregoing, it si hereby

ORDERED that plaintiff Keiko Herskowitz's complaint against defendant Equinox Holdings, Inc. is dismissed in its entirety; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the court.

Dated: June 3, 2013



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD