

Bornstein v 255 W. 84th Owners Corp.

2013 NY Slip Op 31427(U)

July 1, 2013

Supreme Court, New York County

Docket Number: 116516/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

HILDA BORNSTEIN,

Plaintiff,
- against -

255 WEST 84TH OWNERS CORP. and
MIDBORO MANAGEMENT, INC.,

Defendants.

FILED

INDEX NO. 116516/10

MOTION SEQ. NO. 001

JUL 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4, were read on this motion by defendants for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3</u>
Replying Affidavits (Reply Memo) _____	<u>4</u>

Cross-Motion: Yes No

Hilda Bornstein (plaintiff),¹ commenced the herein action against 255 West 84th Street Owners Corp. (Owners), a residential cooperative that owns, operates and manages the building located at 255 West 84th Street, New York, NY 10024 (the building), and Midboro Management, Inc. (Midboro) (collectively, defendants), the managing agent of the building, to recover damages for the theft of multiple pieces of jewelry from her apartment. The theft was committed by William Vasquez (Vasquez), an employee of the building, who pleaded guilty to burglary in the second degree and is currently serving an eight-year prison term. Now before the Court is a motion by the defendants for summary judgment dismissing the complaint, pursuant to CPLR 3212. Plaintiff is in opposition to the motion. Discovery in this matter is

¹ The Court notes that plaintiff is referred to by a variety of names (Hilda Bornstein, Hilda Bornstein Shapiro, Hildy Bornstein) in the herein action, however, the Court will follow the name and caption used in the verified complaint, naming plaintiff as "Hilda Bornstein."

complete and the Note of Issue has been filed.

BACKGROUND

This case arises from an incident that occurred in plaintiff's apartment, 11D, at the building in May or June of 2008 (see Defendants' Affirmation (Aff.) in Support at 15; Complaint at 17). Plaintiff has lived in the building for approximately 40 years (see Defendants' Aff. in Support, Examination Before Trial (EBT) of Hilda Bornstein (Bornstein EBT), exhibit B, p 6; Bill of Particulars (BP) ¶ 3). Plaintiff is a rent-controlled tenant of the building who pays her rent to Midboro (see Bornstein EBT, p 34). Midboro has managed the building since 2002 (Aff. of Michael Wolfe (Wolfe Aff.) at 2).

In or about May or/through June of 2008, plaintiff was vacationing in France, and upon her return on June 8, 2008, she alleges that she discovered jewelry was missing from her apartment (see Complaint ¶¶ 15-16). Plaintiff testified that she filed a report with the police and informed the superintendent of the building, "Jimmy," as well as the property manager, of the missing jewelry (see Bornstein EBT, p. 13-16). Plaintiff testified that a detective assigned to her case interviewed Jimmy and the entire crew of the building regarding the incident, yet all men denied knowledge and culpability (see Bornstein EBT, p. 22).

Vasquez worked at the building since 2002 (see EBT of Ellen Marrone (Marrone EBT), exhibit C, p. 27), he was hired as a porter and/or doorman² and was an employee of Owners (Wolfe Aff. at 4). In June of 2009, a year after the subject burglary, Vasquez was arrested in connection with this incident and other burglaries in the building (Aff. of Earl Kirn (Kirn Aff.) at 4). Vasquez confessed to the robbery of plaintiff's jewelry (BP ¶ 18-20) and was subsequently fired from his position at the building (Wolfe Aff. at 3).

² There exists conflicting information regarding the title of Vasquez's position (see BP ¶ 1, 6, 19; Aff. in Opposition at 10; Aff. in Support at 4).

In this action, plaintiff seeks damages against Owners and Midboro for the negligent hiring, retention, and supervision of Vasquez. Plaintiff alleges she suffered damages in an amount no less than five hundred thousand dollars, including extreme mental anguish, outrage, anxiety concerning her security, disruption of her personal life, and loss of enjoyment of the ordinary pleasures of every day life due to the defendants' negligence.

Now before the Court is a motion by defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, defendants argue, *inter alia*, that Vasquez's actions were outside the scope of his employment, were done in furtherance of personal motives and not the employer's business, and should be considered an abandonment of services. Defendants maintain that theft by an employee does not fall within the scope of employment, and employers are not liable for the thefts of employees in New York. Moreover, defendants justify their employment practices regarding Vasquez by arguing that an employer is only liable when they knew or should have known an employee had tortious propensities for the conduct at issue, and they had no knowledge of Vasquez's criminal propensities until after the incident occurred. Moreover, defendants argue that there was no legal duty to conduct a background check or inquire into an applicant's criminal history because they were not alerted to facts that would lead a reasonable person to utilize these extra precautions. Defendants also argue that Midboro, the managing agent, was not in complete and exclusive control of the building and therefore cannot be liable for the actions of Vasquez and the theft of plaintiff's jewelry.

In opposition, plaintiff argues, *inter alia*, that defendants' motion for summary judgment should be denied because there are material questions of fact as to whether the defendants breached their duty owed to plaintiff by failing to conduct a reasonable investigation into Vasquez's qualifications and references before employing him, and whether performing a background and references check would have created a duty of further inquiry or shown that

the theft would have been foreseeable. Moreover, plaintiff argues that defendants breached their duty by hiring Vasquez, as his criminal history shows he was unfit for the position, and defendants failed to even conduct a minimal investigation before approving Vasquez for employment. If defendants had utilized adequate procedures, plaintiff proffers, they would have been alerted to Vasquez's criminal record, and had defendants completed a background check into his criminal history they would have known about Vasquez's propensity for theft.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see also International Customs Assoc. v Bristol-Meyers Squibb Co.*, 233 AD2d 161, 162 [1st Dept 1996]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida*, 100 NY2d at 81; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]). When a plaintiff opposes the summary judgment motion of a defendant, the plaintiff is "required to set forth something more than vague general charges of wrongdoing. . . where. . . the plaintiffs fail to come forward with evidentiary data indicating merit to the cause of action as alleged, the court should not hesitate to grant defendants' motion for summary judgment" (*Greenbaum v*

American Metal Climax, 27 AD2d 225, 232 [1st Dept 1967]). The opposing party does not meet its burden by merely repeating or referencing the bills of particulars (*Marinelli v Shifrin*, 260 AD2d 227, 228-29 [1st Dept 1999]). Furthermore, facts presented by the movant in his papers may be deemed to be admitted if the opposing party does not contest or deny them (*SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006], quoting *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

An employer cannot be held vicariously liable "for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business (*Fernandez v Rustic Inn, Inc.*, 60 AD3d 893, 896 [2d Dept 2009]; see also *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2d Dept 2006]). If it is established that the incident occurred when the employee was acting within the scope of his employment, liability may ensue (*Davis v City of New York*, 226 AD2d 271, 271-72 [1st Dept 1996]). Even if the employee acts negligently or intentionally, as long as the conduct is "generally foreseeable and a natural incident of the employment," an employer may be liable (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; *RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 164 [2004]). If the employee departs from his duties, acting not within the scope of his employment, his actions are considered an abandonment of his service to the employer, and

the employer may not be held liable (*Judith M.*, 93 NY2d at 933; *RJC Realty*, 2 NY3d at 164). An employee's actions are not within the scope of his employment unless their purpose is to further the interest or business of the employer (*Davis*, 226 AD3d at 272).

Notwithstanding the aforementioned, an employer may be held liable for negligent hiring, supervision, and retention of the employee (see *Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 586 [2d Dept 2006]; *Carnegie*, 28 AD3d at 600), which is the cause of action that plaintiff asserts against defendants in this case. However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (see *G.G. v Yonkers Gen. Hosp.*, 50 AD3d 472, 472 [1st Dept 2008] ["In order to recover against an employer for negligent retention of an employee, a plaintiff must show that the employer was on notice of a propensity to commit the alleged acts"]; *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]; *Gomez v City of New York*, 304 AD2d 374, 374 [1st Dept 2003] ["recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee"]; *Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801 [2d Dept 2010]; *Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006], quoting *Kirkman v Astoria Gen. Hosp.*, 204 AD2d 401, 403 [2d Dept 1994] ["A cause of action for negligent hiring...is based upon the defendant's status as an employer... 'when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm'"]; *Doe v Rohan*, 17 AD3d 509, 512 [2d Dept 2005] *appeal denied* 6 NY3d 701 [2005] ["plaintiffs failed to come forward with evidence sufficient to raise a triable issue of fact as to whether they knew or should have known that the bus driver had a propensity to commit acts of sexual misconduct"]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997] *cert denied* 522 US 967 [1997] *lv dismissed* 91 NY2d 848 [1997]).

While landlords have a “common-law duty to take minimal precautions to protect tenants from foreseeable harm” (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998], quoting *Jacqueline v City of New York*, 81 NY2d 288, 293-94 [1993]), “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” (*Jackson*, 69 AD3d at 801-802, quoting *Carnegie*, 28 AD3d at 600, quoting *Doe v Whitney*, 8 AD3d 610, 612 [2d Dept 2004]; see also *Kenneth R.*, 229 AD2d at 163; *T.W. v City of New York*, 286 AD2d 243, 345 [1st Dept 2001] [“An employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee”]). An employer is under no duty to inquire into the criminal past of a prospective employee (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept 2001] [“Liability will attach on such a claim only when the employer knew or should have known of the employee’s violent propensities”]; see also *Amendolara v Macy’s N.Y.*, 19 AD2d 702, 702 [1st Dept 1963]; *McCann v Varrick Group LLC*, 84 AD3d 591, 591-92 [1st Dept 2011] [“We reject plaintiff’s contention that a background check of the security guard would have revealed his propensity to engage in the subject conduct”]; *Day v J. Vlachos Hellenic Serv. Sta.*, 2 AD3d 482, 482 [2d Dept 2003]; *Ehrich v Guaranty Trust Co. of New York*, 194 AD 658, 664 [1st Dept 1921] [“An employer is not bound to assume that an employee, whom he has no reason to suspect of dishonesty, will or may commit a crime. On the contrary, the presumption is that he will do right and not wrong”]).

The Court finds that defendants have met their *prima facie* burden of establishing entitlement to summary judgment dismissing the complaint alleging negligent hiring, supervision, and retention by presenting evidence that they had no specific knowledge or notice of Vasquez’s propensity for larceny (see *White*, 35 AD3d at 244; *Ghaffari v North Rockland*

Cent School Dist., 23 AD3d 342, 343-44 [2d Dept 2005]).³ Defendants assert that they had not encountered a similar incident or "bad act" by any employee, including Vasquez, before the incident giving rise to this case, and therefore were not put on notice of Vasquez's, or any other employee's, propensity for larceny (see *Aff. in Support* at 25, 28). Current property manager/account executive Ellen Marrone and property manager/account executive at the time of the incident, Earl Kirn (Kirn), testified that they knew of no complaints concerning Vasquez by the building's tenants or shareholders and Vasquez received no warnings or reprimands during the years before the incident that they could recall (see *Marrone EBT*, p. 33; *EBT of Earl Kirn (Kirn EBT)*, exhibit D, p. 35-36; *Kirn Aff.* at 8). Kirn, in his affidavit, states that "prior to Ms. Bornstein's complaint in June 2008, I received no reports of any burglaries, attempted burglaries, unauthorized intrusions, or any bad acts by building staff, which would indicate a propensity for larcenous acts" (*Kirn Aff.* at 6).

In the instant case, there is no proof on the record demonstrating that defendants were aware of any prior conduct on the part of Vasquez that would put them on notice of the foreseeability of such incidents as plaintiff alleges here. Therefore, defendants had no obligation to conduct an investigation into Vasquez's background (see *Jackson*, 69 AD3d at 801-02; *Yeboah*, 286 AD2d at 205; *Amendolara*, 19 AD2d at 702; cf. *T.W.*, 286 AD2d at 245 ["A jury could reasonably conclude that [defendant] had a duty to conduct an investigation of [employee's] background given its *actual knowledge* that he had a conviction"] [emphasis added]). As an account executive, Ellen Marrone (Marrone) would interview potential applicants for building positions and testified that she only asks about a potential employee's criminal history if there is a "red flag" (see *Marrone EBT*, p. 23). It became the industry standard to do

³ The Court need not discuss the merits of Midboro's claim it was not in complete and exclusive control of the building and therefore cannot be held liable since plaintiff does not contest this claim and the defendants meet their *prima facie* case on other grounds.

a credit check or background check in 2005, however Vasquez was hired in 2002 (see *Marrone EBT*, p. 21, 50).

In opposition, plaintiff failed to submit evidence raising a triable issue of fact as to whether defendants had notice of conduct by Vasquez demonstrating a propensity for larceny (see *Taylor v United Parcel Serv., Inc.*, 72 AD3d 573, 573-74 [1st Dept 2010]; *White*, 35 AD3d at 244; *Gomez*, 304 AD2d at 375; cf. *G.G.*, 50 AD3d at 472 ["plaintiff raised a triable issue of fact based on the testimony of a nursing aide who had previously reported that the [employee at issue] had offered a patient medication in exchange for sex"]). Plaintiff argues, *inter alia*, that defendants were negligent with regards to employing Vasquez because they did not investigate his into his background or references (see *Aff. in Opposition* at 35). Plaintiff asserts that Vasquez had a prior criminal history consisting of three convictions at the time he was hired (see *id.* at 13) and that defendants would have acquired this knowledge if they exercised "reasonable care and prudence" before hiring Vasquez (see *id.* at 42). However, plaintiff fails to put forth any evidence that would suggest defendants had actual knowledge or were aware of prior conduct that would put them on notice and require them to investigate Vasquez further before and during his employment (see *Yeboah*, 286 AD2d at 205 ["An employer is under no duty to inquire as to whether an employee had been convicted of crimes in the past"]; *Kenneth R.*, 229 AD2d at 163 ["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"]). Moreover, plaintiff fails to elaborate on and/or attach documents pertaining to Vasquez's criminal history to support the position that an employer exercising reasonable care would not hire Vasquez for this position if made aware of this information and that his larcenous conduct would now be foreseeable in light of this information (see *Aff. in Opposition* at 29, 30). Thus, defendants' motion for summary judgment is granted.

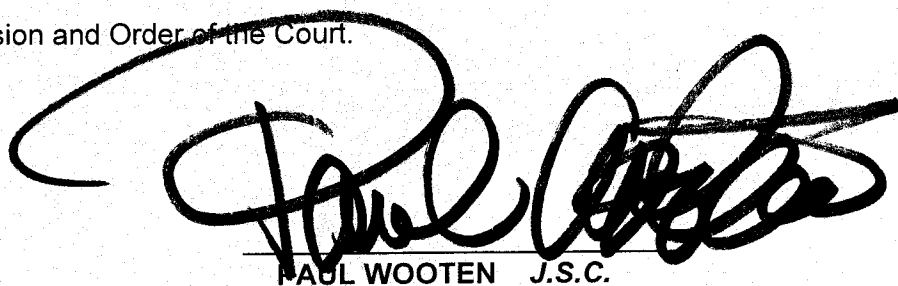
CONCLUSION

Accordingly it is,

ORDERED that defendants 255 West 84th Owners Corp. and Midboro Management, Inc.'s motion for summary judgment is granted and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the defendants are directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 7-1-13

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: NO POST REFERENCE

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