Hill v Kerman Protection Sys.
2013 NY Slip Op 32859(U)
April 19, 2013
Sup Ct, New York County
Docket Number: 111309/2010
Judge: Carol R. Edmead
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FILED: NEW YORK COUNTY CLERK 04/25/2013 INDEX NO. 111309/2010
NYSCEF DOC. NO. 41 RECEIVED NYSCEF: 04/25/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 111309/2010
HILL, JACKIE J.
vs
KERMAN PROTECTION SYSTEMS
Sequence Number : 001
SUMMARY JUDGEMENT

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 this negligence action, defendant/third-party plaintiff Kerman Protection Systems ("Kerman") moves for summary judgment dismissing the complaint of the plaintiff Jackie Hill ("plaintiff").

Plaintiff was assaulted by an unknown assailant on November 30, 2007 while working at the Map Lingerie store in Manhattan (the "store"). The store had a burglar alarm system provided by Kerman, which was activated when the store was closed. According to plaintiff's deposition testimony, plaintiff was looking at the register, and when she picked up her head, noticed the assailant standing there (Plaintiff EBT, p. 58). She would not have let him in because he was disheveled and looked dirty (id., pp. 59-60). After indicating that he wanted to purchase a bra, he assaulted her (p. 61). Plaintiff alleges that the assailant was able to enter the store without being "buzzed in."

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New

Dated: ____ ____, J.S.C.

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
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[* 2]

York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Meridian Management Corp. v Cristi Cleaning Serv Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Cabrera v Rodriguez*, 72 AD3d 553, 900 NYS2d 29 [1st Dept 2010]; *Casper v Cushman & Wakefield*, 74 AD3d 669, 904 NYS2d 385 [1st Dept 2010]).

It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendant owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

As the movant, defendant failed to establish, as a matter of law, that it owed no duty to plaintiff to provide for her safety, and that defendant did not breach any purported duty owed to plaintiff.

First, it is undisputed that the contract between Kerman and the store expressly states that the "Parties agree that there are no third-party beneficiaries of this contract." (Contract, Exh. R, ¶16). Therefore, plaintiff was not an intended third-party beneficiary of defendant's contract with her employer (*see Rahim v Sottile Sec. Co.*, 32 AD3d 77, 817 NYS2d 33 [1st Dept 2006]). The principle that a "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 773 NE2d 485 [2002]), has applied in actions against security companies (*Einhorn v Seeley*, 136 AD2d 122, 525 NYS2d 212 [1st Dept 1988]; *see also Rahim v Sottile Sec. Co.*, 32 AD3d at 80, *citing Anokye v 240 E. 175th St. Hous. Dev. Fund Corp.*, 16 AD3d 287, 288, 792 NYS2d 417 [2005]; *Dabbs v Aron Sec., Inc.*, 12 AD3d 396, 397, 784 NYS2d 601 [2004]; *Four Aces Jewelry Corp. v Smith*, 257 AD2d 510, 511, 684 NYS2d 224 [1999]; *Gonzalez v National Corp. for*

Hous. Partnerships, 255 AD2d 151, 152, 679 NYS2d 395 [1998], lv denied 93 NY2d 812, 695 NYS2d 541, 717 N.E.2d 700 [1999]; *Pagan v Hampton Houses*, 187 AD2d 325, 325, 589 NYS2d 471 [1992]; *Bernal v Pinkerton's, Inc.*, 52 AD2d 760, 760–761, 382 NYS2d 769 [1976], affd. 41 NY2d 938, 394 NYS2d 638, 363 NE2d 362 [1977]). Accordingly, since plaintiff was neither a party to defendant's contract nor an intended third-party beneficiary thereof, the Court must look to evidence of any circumstances that could support a finding that defendant owed plaintiff a duty of care (*see Rahim v Sottile Sec. Co., supra*).

In this regard, there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care, and thus be potentially liable in tort, to third persons [other than intended third-party beneficiaries], of which only one arguably applies. Defendant, the contracting party, did not launch a force or instrument of harm;[1] and did not entirely displace the store owner's duty to maintain the premises safely[2] (*see Rahim v Sottile Sec. Co., supra, citing Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 746 NYS2d 120, 773 NE2d 485 [2002]). However, it cannot be said, as a matter of law, that plaintiff did not detrimentally rely on the continued performance of the defendant's duties.

In order to enter the store, an employee would disengage the lock to the door by "buzzing in" the person in (Plaintiff EBT, pp. 41, 46). The locking mechanism installed on the door consisted of both a magnetic lock and the push to exit button at the side of the door (Peress EBT, pp. 13-14). Mr. Peress described how the locking mechanism worked:

> At the top of the door there's a magnetic lock. . . . At the side of the door is a push to exit button which would basically de-energize the magnet so that you're able to exit . . . . We would hear the doorbell ring and buzz the customer in. . . . (Peress EBT, pp. 13-14).

* * * * *

Mr. Peress testified that if the door "closed very, very slowly it would hover and not snap shut" (EBT, p. 52). At various times, the door would close slowly and not "snap" shut and the magnetic lock at the top of the door would not engage (pp. 39, 51, 52) based on "a lot of factors," including if the screws would come loose (p. 11), or if the weather was cold or an elderly person "gingerly" walked in, the door would not close with enough force (pp. 12, 37, 39). Peress would adjust the screws to ensure the door would lock (p. 38). Two "screws adjusted the rate at which it opened in terms of velocity that it would swing and the velocity that it would close" and when the door closed slowly, he would "go there with my screwdriver and adjust it." (EBT, p. 52). When the mechanism was not working properly either based on the screws coming loose or based on the swinging of the door, Mr. Peress "would adjust the door." (EBT, p. 37). When the employees "would complain about the door not always locking," Mr. Peress would adjust the door to ensure that it "lock as many times and as well as possible." (EBT, p. 38).

Mr. Peress also stated that the push to exit button "would be slow to pop back out

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[1] *See, Einhorn v Seeley,* 136 AD2d 122, 525 NYS2d 212 [1st Dept 1988] ("This is not a case in which the defendant locksmith itself injured the plaintiff either by a direct volitional act or even by some negligent act, i.e., leaving a bag of tools in a doorway. Here, the act complained of by plaintiff was perpetrated by an intervening person. . . .")).

[2] See discussion below concerning the store owner's continued exercise of his duty to repair the door.

because the spring was worn" as it was constantly used. As a result of the push to exit button "not staying engaged," the door did not always lock . . . ." (EBT, p. 43). In September 2007, Mr. Peress asked Kerman "to replace the push to exit button" because the button was worn out (pp. 42-43) and did not ask Kerman to check the remote clickers, doorbell, or the magnetic lock at the top (EBT, pp. 15, 36, 37). "They were not hired to check the magnetic lock at the top of the door." (EBT, p. 50). After the push to exit button was replaced, it "worked considerably better than what was there previously" (EBT, p. 44). When asked how many times Kerman came into the store to do that work, Mr. Peress replied, "Once. Twice." (EBT, pp. 15-16, 38).

Plaintiff complained many times to Mr. Peress about the door not closing, who then told her to call Kerman (EBT, p. 33). She "assumed when [Kerman's employees] came there, they would fix it because they were the ones that were called."(EBT, p. 34) There "was always a problem" with the locking mechanism, such that new employees were told to "be careful, the door sometimes doesn't lock" (EBT, p. 49). According to plaintiff, "when the magnet worked it [the door] was close[d]. If the magnet wasn't working, the door would be like just resting. . . on the frame" (EBT, pp. 49-50). When asked if she ever witnessed anyone doing work on the door lock itself, she testified "Just the people from Kerman." (EBT, p. 52). And, "whoever came from Kerman would say, 'It's fine. See you next time. It's fine right now" (EBT, p. 53).

Plaintiff's negligence claim is premised on the purported malfunctioning door lock mechanism. The record indicates that this mechanism was based, in large part, on the magnetic strip and the push to exit button. The submissions indicate that the alleged non-functioning lock was not part of the burglar alarm system or equipment provided by Kerman, or the scope of Kerman's services. However, the submissions also indicate that Kerman undertook to replace the push to exit button, and plaintiff claims that she observed Kerman performing work at the front of the store where the lock and push to exit button were located, and that Kerman's employees stated that the door was "fine."

That Kerman is not a locksmith, does not provide locks, and did not provide the magnetic door lock (Kerman EBT, pp. 9, 11, 19, 30, 53) is undisputed, but does not dispose of the issue. Nor does the fact that Kerman replaced the push to exit button on the wall (p. 67) on one occasion as a favor, establish the absence of a duty to plaintiff under the circumstances (*cf. Einhorn v Seeley*, 136 AD2d 122, 525 NYS2d 212 [1st Dept 1988] (stating that where plaintiff was assaulted in a building, "to hold a locksmith responsible for the alleged consequences of an allegedly defective lock would be to enlarge the obligations of such artisans far beyond the existing law and beyond sound public policy.")). Although Kerman instructed Peress to contact a locksmith (pp. 86-87), the record indicates that the push to exit button, which was replaced by Kerman, also could cause the door to remain unlocked if the push to exit button was not working properly, and that plaintiff relied, to her detriment, on the push to exit button's functionality.[3]

Therefore, summary dismissal of the complaint against Kerman is unwarranted.

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[3] *Cf. Rahim v Sottile Sec. Co.*, 32 AD3d 77, 817 NYS2d 33 [1st Dept 2006] (where plaintiff's own testimony negated any claim that, on the night of the incident, he relied on security guard to ensure that all customers had left the store prior to closing. Plaintiff testified that he knew the security guard had left the store 20 minutes before closing that night without first checking to make sure that all customers were gone. Thus, at no point after the security guard left the store could plaintiff have been acting in reliance on the guard's performance of tasks)).

[* 5]

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

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

This constitutes the decision and order of the Court.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

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