

**Grafov v Chelsea Bicycles Corp.**

2013 NY Slip Op 34098(U)

April 7, 2013

Supreme Court, New York County

Docket Number: 110620/08

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

BA  
4/14/14  
E

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

ALEX GRAFOV,

Plaintiff,

Index No.: 110620/08

Motion Date: 04/12/13

Motion Seq. No.: 02

CHELSEA BICYCLES CORPORATION and "JOHN DOE"  
MANAGER,

Motion Cal. No.: \_\_\_\_\_

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Defendants.

The following papers, numbered 1 to 2 were read on this motion to reargue.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____

FILED

Cross-Motion:  Yes  No

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Upon the foregoing papers,

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NEW YORK

The court shall deny plaintiff's motion pursuant to CPLR 2221 to renew and reargue this court's decision and order dated July 2, 2012.

To the extent plaintiff seeks renewal, no new facts have been adduced in the moving papers so such an application is unsupported.

To the extent that plaintiff seeks reargument, plaintiff fails to identify "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion."

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

CPLR 2221 (d) (2). Contrary to plaintiff's assertions as directly contradicted by the text of this court's prior order, this court made no factual findings in consideration of defendant's summary judgment motion but instead viewed the relevant facts in the light most favorable to the plaintiff's claims. Nor did this court determine that plaintiff had no cause of action for the alleged assault and epithets plaintiff alleges were directed towards him. The only issue presented on the prior motion is whether under applicable legal principles the corporate defendant, Chelsea Bicycles, could be held liable for the acts of its employee under the doctrine of respondeat superior. In considering that legal question the court assumed the truth of the allegations made by plaintiff to the extent those allegations were supported by evidence in the record.

As stated by an appellate court considering a similar motion to reargue where summary judgment was granted to an employer where an employee pushed a minor to the ground while on duty

An employer is vicariously liable for the acts of its employee committed within the scope of employment and in furtherance of the employer's business. The municipal defendants established their prima facie entitlement to judgment as a matter of law as to the vicarious liability cause of action by showing that [the employee's] conduct in pushing the plaintiff was not within the scope of his employment. In opposition, the plaintiff failed to raise a triable issue of fact.

To establish a cause of action based on negligent hiring and supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury. The municipal defendants established their prima facie entitlement to judgment as

a matter of law as to the negligent hiring and supervision cause of action by showing that they were not on notice that [the employee] allegedly had violent propensities. In opposition, the plaintiff failed to raise a triable issue of fact.

Evans v City of Mount Vernon, 92 AD3d 829, 830-31 (2d Dept 2012)  
(citations omitted) lv to appeal denied, 20 NY3d 852 (2012).

In this case, plaintiff has failed to introduce any evidence that the acts allegedly committed by the employee were in furtherance of the defendant's retail business which requires the goodwill of its customers based upon its reputation. Furthermore, plaintiff has introduced no evidence that defendant's manager/owner was on notice prior to the incident that the employee had any propensity to commit violence against customers.

The only remotely relevant authority cited in plaintiff's current application is the Third Department's decision in Hayes v City of Amsterdam (2 AD3d 1139 [3d Dept 2003]). Hayes, however, involved a lawsuit by a bystander against the City based upon injuries caused by police officers as they attempted to subdue an unruly individual. In complete contrast to this case, there was no dispute in Hayes that the officers were acting within the scope of their employment, subduing a possibly dangerous individual, at the time of the accident. Here, plaintiff proffers no evidence that defendant employee was acting within the scope of the bike repair shop business when he allegedly

placed plaintiff in a choke hold. In fact, the only evidence is that the owner was actually engaged in attempting to further repair the bicycle in question at the rear of the store, as the verbal dispute between the individual defendant and plaintiff and their physical altercation near the cash register transpired.

Nor is there any evidence that the bicycle repair shop owner either directed or even acquiesced in (see Adams v New York City Transit Authority, 88 NY2d 116, 118 [1996]) the alleged assault. The owner's testimony, which is not refuted, is that he was bringing the bicycle, which brakes he further tightened, from the rear of the store, when he heard plaintiff and his employee, the individual defendant, exchanging angry words. He then observed plaintiff and the individual defendant in physical contact, whereupon he with the help of another person separated them.

Accordingly, it is

ORDERED that the motion of plaintiff to renew this court's order of July 12, 2012 is denied; and the motion of plaintiff to reargue this court's order of July 12, 2012 is granted, and upon reargument the court adheres to its original decision.

This is the decision and order of the court.

Dated: April 7, 2013

ENTER:

**FILED**

APR 14 2014

*Debra A. James*  
**DEBRA A. JAMES** J.S.C.

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