

**Rodriguez v Judge**

2014 NY Slip Op 30546(U)

January 27, 2014

Sup Ct, Queens County

Docket Number: 700268/2011

Judge: Denis J. Butler

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12  
Justice

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THOMAS RODRIGUEZ,

Plaintiff,

-against-

EDWARD JUDGE and COMMUNITY CHURCH OF  
ASTORIA,

Defendants.  
-----x

Index No.: 700268/11

Motion Date:  
November 13, 20123

Cal. No.: 147  
Seq. No.: 5

The following papers were electronically filed and read on this motion by defendant Community Church of Astoria for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3212 and plaintiff's cross-motion for an order granting summary judgment and striking defendant's answer.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion, Affirmation, Affidavits, Exhibits .....	EF 90 - 100
Answering Affirmation In Opposition, Memorandum of Law, Exhibits.....	EF103 - 109
Reply Affirmation, Memorandum of Law Exhibits.....	EF133 - 137
Notice of Cross-Motion, Affirmation, Affidavit, Memorandum of Law, Exhibits .....	EF110 - 132
Affirmation In Opposition, Exhibits, Memorandum of Law.....	EF138 - 163
Reply Affirmation, Memorandum of Law, Exhibit.....	EF164 - 167

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as follows:

Plaintiff commenced the action alleging assault and battery and negligence. Defendant Community Church of Astoria ("Church") seeks an order granting summary judgment dismissing the action. Plaintiff cross moves for an order granting summary judgment, or

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QUEENS COUNTY

'in the alternative striking the defendants' answer.

To grant summary judgment, it must clearly appear that there are no material issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957] ). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957]).

In this action for assault, battery and negligence plaintiff alleges that defendant Church, through its agent, an officer of the Church, Mrs. Rhonda Judge, aided, abetted and facilitated co-defendant Judge in his alleged assault and battery against plaintiff Rodriguez. Plaintiff alleges that defendant was negligent, careless and reckless in allowing defendant Judge to have access to a gate pole that was located on its property and by failing to control Mr. Judge's actions while on its property.

In support of its motion defendant Church argues that plaintiff cannot demonstrate that it owed any duty to plaintiff, that it had any control over defendant Judge or that it acted in concert with defendant Judge in committing the alleged assault and battery.

Plaintiff contends that defendant church had control over defendant Judge through its agent, Rhonda Layne Judge, the Treasurer of the Church and also the wife of defendant judge. Plaintiff argues that nonparty Rhonda Judge aided and abetted her husband by inciting and encouraging him to attack plaintiff. Plaintiff also argues that Mrs. Judge either gave or gave access to the gate pole to her husband, defendant Judge. Plaintiff alleges Mrs. Judge's actions, as an agent of defendant Church, make the church vicariously liable for defendant Judge's action.

The cornerstone of plaintiff's claim against defendant Church is the doctrine of respondeat superior under which an employer can be held vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment (*Riviello v Waldron*, 47 NY2d 297). If, however, an employee "for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service,

the master is not liable" (Jones v Weigand, 134 App Div 644, 645, quoted in Baker v Allen & Arnink Auto Renting Co., 231 NY 8, 13).

The subject incident occurred on Sunday morning, July 25, 2010 on the sidewalk in front of, or in close proximity to, defendant Church. As defendant Judge and his wife, Rhonda Layne Judge, were on their way to church service, plaintiff and defendant Judge accidentally bumped into each other and then became involved in a physical altercation. At some point after the altercation began, but before it was completely over, defendant Judge and his wife entered the Church building and thereafter, defendant Judge left the building, with a gate pole owned by the church. Plaintiff contends that non-party Rhonda Layne Judge encouraged and directed defendant Judge to attack the plaintiff and either provided or gave defendant Judge access to a gate pole located in the Church building. It is also alleged that defendant Judge attacked plaintiff with the gate pole and caused severe injuries.

Granting plaintiff every favorable inference, considering the deposition testimony submitted by plaintiff and defendant Church and accepting, as true, plaintiff's allegations about Mrs. Judge's actions, it is clear that at the time of the incident Mrs. Judge was not acting within the scope of her position as Treasurer of the Church and had departed from her duties for solely personal reasons unrelated to the furtherance of the Church's business. (Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 933 (N.Y. 1999))

With respect to plaintiff's claim on the grounds of negligence, it is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability. (Pulka v. Edelman, 40 N.Y.2d 781, 782 (N.Y. 1976))

Here, the record is clear that plaintiff had no connection with defendant Church, plaintiff was a pedestrian traversing the sidewalk in front of the Church building when he became involved in a physical altercation. There is nothing in the record to establish or infer that there exists a special relationship giving rise to a duty of care owed by defendant Church to plaintiff.

Again, even if plaintiff's allegation that defendant Church failed to adequately secure the gate pole and thereby created an unsafe condition is true, the mere fact that a consequence might foreseeably result from a condition does not serve to establish a

duty owing from a defendant to a plaintiff. In the absence of a duty, as a matter of law, no liability can ensue. (Gonzalez v. Pius, 138 A.D.2d 453, 453-454 (N.Y. App. Div. 2d Dep't 1988))

Based on the foregoing, the motion by defendant Church for summary judgment dismissing the action as against defendant Church is granted and the cross motion by plaintiff for summary judgment in its favor is denied.


The court notes that pursuant to an order of this court dated November 20, 2012, plaintiff has a default judgment against defendant Judge on the issue of liability, and the inquest on damages was scheduled to be held at the time of trial. This matter is currently on the Trial Calendar for March 13, 2014.

Therefore, plaintiff is directed to serve a copy of this order, with notice of entry, on all named defendants within 15 days of the date that this order is entered. All interested parties are directed to appear for an inquest on March 13, 2014 at 9:30 a.m. in the Trial Scheduling Part, Part 25, in the Queens Supreme Court Building located at 88-11 Sutphin Blvd., Jamaica, New York.

Accordingly, the motion by defendant Church is granted and the complaint is dismissed as against defendant Church; the cross motion by plaintiff is denied and an inquest on damages with respect to defendant Judge is set down for March 13, 2014.

This constitutes the Decision and Order of the Court.

Dated: January 27, 2014

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Denis J. Butler, J.S.C