Vicuna v Empire Today, LLC
2014 NY Slip Op 30935(U)
April 8, 2014
Supreme Court, New York County
Docket Number: 104830/2008
Judge: Carol R. Edmead

[* 1]

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

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JAVIER VICUNA,

Plaintiff,

-against-

EMPIRE TODAY, LLC (a Northlake, Illinois-based Company) and EMPIRE TODAY, LLC (a New York-based company) and SHOMAR A. DWYER,

Defendants.

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DECISION AND ORDER

Index No. 104830/2008
Motion Seq. # 005

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries, defendants Empire Today, LLC (a Northlake, Illinois-based company) and Empire Today, LLC (a New York-based company) (collectively, "defendants") move pursuant to CPLR 3211 and 3212 to dismiss the complaint and cross claims[1] asserted against them.

Factual Background

Plaintiff, Javier Vicuna ("plaintiff") a then carpet installer for an independent contractor, alleges that on May 4, 2007, while at defendants' carpet warehouse in Sysosset, New York, defendant Shomar Dwyer ("Dwyer"), in the scope of his employment and in the course of his duties for what is believed to be the benefit of his employers, defendants herein, entered into an altercation with plaintiff, causing plaintiff personal injuries.

According to plaintiff's pleadings and deposition testimony, he arrived at the defendants' warehouse around 4:00 p.m. and was waiting in the waiting room for jobs to be assigned for that day or the following day (pp. 127-128). He approached the glass window where Dwyer, the

[1] There is no objection to dismissal of any cross-claims against defendants.

installation coordinator for defendants, and "ask[ed] him for a job for the next day" (p. 130). Dwyer told him "to get the hell out of there and he insulted me and said I'm busy here" (p. 130). Dwyer "used some bad manners, some words that are known like you are garbage. He used even some Spanish"; Dwyer called plaintiff a "SOB" (p. 131), "a sh–tty person"; called plaintiff a "mother fu- - er, to get the hell out of there . . . ." (p. 135). Plaintiff then sat down, and Dwyer said "Son of a b- - - - , your mother is a bi - - -" and plaintiff "stood up" and told Dwyer to "get the f- - - out of here" (pp. 137, 142-143). Then plaintiff "sat down" and "was looking at him" because "he insulted me" (pp. 137-138). Dwyer, who was behind the window, then "came out to say why I was staring at him and I told him not to insult me" and walked up to plaintiff until "he got close to me" and pointed to the garbage can, saying "he was going to put me there"; called plaintiff "an illegal alien" (pp. 139, 141). Dwyer and spat on plaintiff two or three times, and plaintiff took off his shirt and spat back at plaintiff's face (p. 145). Dwyer then hit plaintiff in the face (p. 145).

Dwyer testified that on the date of the incident, plaintiff "asked if I could give him some work for the next day." (p. 24, 39). Dwyer told "him hold on, just let me get things in order and I'll be right with him" and went inside "to get the process rolling as to sign in work for the next day." (p. 25). When inside, plaintiff "was threatening me a threatening manner from his body language and his demeanor, banging on the glass, things of that nature . . . He hands was up, fists was closed. . . ." (p. 49). Plaintiff "walked up to me face to face, like, with his shirt off, trying to strong arm me basically" (p. 54).

As a result of the incident, plaintiff alleges two causes of action against defendants, namely negligent hiring and supervision of Dwyer, and joint and several liability for punitive

damages on the ground that "defendants, in the "scope of his [Dwyer's] employment," caused Dwyer to assault and batter plaintiff and that defendant "hurled racial epithets" and racial tirades, and caused plaintiff injuries.[2]

In support of dismissal, defendants submit the pleadings, verified bill of particulars, and deposition transcripts of plaintiff, non-party witnesses Kelly Dittmer (Dwyer's supervisor at Empire) and Dwyer, and affidavit of non-party witness Gerardo Benavides, and background check of Dwyer. Defendants argue that to the extent plaintiff's claims based on the theory of respondeat superior are premised on Dwyer's assault, plaintiff failed to plead the underlying tort, as there are no allegations that Dwyer was carrying out his duties enjoined upon him by defendants. In any event, there are no allegations that defendants condoned, instigated, or authorized the alleged assault or any prior assaultive behavior, or that Dwyer's alleged assaultive conduct was foreseeable.

Further, such records demonstrate that defendants did not know about any vicious propensities of Dwyer. There are no records of violence in Dwyer's reviews or background check. Regardless of which version of events is believed, Dwyer may not be said to have been acting within the scope of his employment or in furtherance of defendants' business; instead, Dwyer departed from his duties for solely personal motives.

And, in the absence of any evidence that defendants authorized, participated in, consented to or ratified Dwyer's alleged tortious conduct, plaintiff's punitive damages claim must be dismissed.

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[2] Plaintiff's complaint names both causes of action as "first cause of action." (see p. 2, 3). The cause of action on page 2 appears to assert a claim for negligent hiring, retention and supervision, whereas the cause of action on page 3 appears to assert a claim under theory of respondeat superior.

Defendants also argue that they cannot be held liable for negligent hiring or supervision, as there is no evidence that they were on notice of any tortious propensities of Dwyer. The record shows that Dwyer was trained, supervised, and regularly reviewed by defendants, and that defendants did not negligently hire or retain Dwyer.

In opposition, plaintiff argues that Kelly Dittmer of Empire testified that there would be times when installers were not happy because they "don't receive work," and that "There was no instructions" for installation coordinators to deal with installers who were unhappy (p. 53). Further, Dwyer's personnel file, exchanged after the deposition of Dittmer, contradicts Dittmer's testimony in some manners, and shows that Dwyer had a long history of anger management issues and that he was a "hot head," "snapping at hourly associates," and had problems with "stress management" prior the incident. Although Dittmer stated that Dwyer did not receive any disciplinary action from her, the employee file shows that she signed the performance reviews in his personnel file. Other than verbal warnings, there is no evidence that defendants took any action to address Dwyer's anger management problems.

Further, the witness statements of the events conflict with Dwyer's version of the events, raising issues of fact as to how the incident actually occurred.

In reply, defendants argue that the personnel file and witness statements are not in admissible form, sufficient to defeat defendants' motion. Further, plaintiff cannot cherry pick statements from the personnel file and take them out of context. Plaintiff ignores the positive remarks and the context in which the statements were made in Dwyer's personnel file. Stress is a part of every job, everywhere, and is insufficient to support a claim that defendants had knowledge that Dwyer would be involved in an altercation with an individual. Profanity toward

one co-worker, and inappropriate language toward another, without any physical confrontation, are also insufficient to confer liability against an employer.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; 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]).

As to dismissal pursuant to CPLR 3212, 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 to eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The defendant "must assemble and lay bare [its] affirmative proof to

demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). However, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 N.E.2d 718; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498, 144 NE2d 387), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 859 NYS2d 646 [1st Dept 2008]; *Murray v City of New York*, 74 AD3d 550, 903 NYS2d 34 [1st Dept 2010]).

Respondeat Superior

"An intentional tort, such as the assault here, committed by an employee can result in liability for his or her employer, under respondeat superior if the employee was acting 'within the scope of the employment' at the time of the commission of the tort" (*Ramos v Jake Realty Co.* 21 AD3d 744, 801 NYS2d 566 [1st Dept 2005]). "[T]he employer need not have foreseen the precise act or manner of the injury as long as the general type of conduct may have been reasonably expected" (*Ramos, supra*). The determination of whether the doctrine applies depends upon,

> "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 the employer could reasonably have anticipated."
> (*Ramos, supra*).

The doctrine is premised upon a notion that the employer "is justly held responsible when

the servant through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another" (*Ramos, supra*).

However, an employer will not be vicariously liable for its employee's alleged assault "where the assault was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer" (*Milosevic v O'Donnell*, 89 AD3d 628, 934 NYS2d 375 [1st Dept 2011] *citing Yeboah v Snapple, Inc.*, 286 AD2d 204, 204–205, 729 NYS2d 32 [2001]).

Erica Sanchez, the Employee Relations Supervisor for defendants attests in her affidavit that Dwyer's actions in striking plaintiff were outside of the scope of his employment with defendants, and that Dwyer "was terminated for violation of company policy on May 11, 2007.

The deposition testimonies also indicate that rather than furthering his employer's interests, Dwyer's alleged tortious conduct was motivated by personal and/or personal racial animus and plaintiff's "staring" at him, and occurred when Dwyer stepped out from his assigned post and confronted plaintiff. In order for liability to attach, the tortious act must have in some way been effectuated to advance the employer's interest (*Adams v New York City Transit Authority*, 211 AD2d 285, 626 NYS2d 455 [1st Dept 1995] ("Liability will not attach, however, where the acts are outside the general scope of the employment or are done with a purpose foreign to the interests of the employer") *citing Sauter v New York Tribune, Inc.*, 305 NY 442, 445, 113 NE2d 790; *Santamarina v Citrynell*, 203 AD2d 57, 609 NYS2d 902). Here, plaintiff failed to allege any facts, or point to any facts uncovered through discovery, showing how or in what manner Dwyer's actions in assaulting him was in furtherance of defendants' business or in

furtherance of effectuating his duties. Nothing in the record indicates that carpet installation coordinators engage in assaultive type conduct in discharging their regular duties (*see, Horvath v L & B Gardens Inc.*, 29 Misc 3d 1211(A), 958 NYS2d 307 (Table) [Supreme Court, Kings County 2010] ("Waiters, cooks and kitchen staff do not engage in such conduct in discharging their normal duties")). The alleged altercation was fueled by defendant's personal dislike of plaintiff, and was a clear departure from defendants' normal methods of performance (*see e.g., Ray v Metropolitan Transp. Authority*, 221 AD2d 613, 634 NYS2d 160 [2d Dept 1995] (employee took plaintiff to another area and beat him)). Further, there is no evidence that the assault was condoned, instigated or authorized by defendants.

That Dwyer may have struck plaintiff because plaintiff got in his face about work[3] does not raise an issue of fact as to whether Dwyer struck plaintiff *in the furtherance* of his employer's business interest, or whether the assault was condoned, instigated or authorized by defendants. Therefore, the cause of action premised on the theory of respondeat superior is severed and dismissed.

Negligent Hiring and Retention

In negligent hiring and negligent retention actions, "[t]he negligence of the employer in such a case is direct, not vicarious, and arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and

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[3] On the day following the incident, Dwyer told Dittmer that he "was walking by and one of the installers got in his face about work, and he got scared, and ended up swinging . . . because he was the only one from Empire in the warehouse facility." (pp. 58-59).

retention of the employee" (*White v Hampton Management Co. L.L.C.*, 35 AD3d 243, 827 NYS2d 120 [1st Dept 2006], *citing Gomez v City of New York*, 304 AD2d 374, 758 NYS2d 298 [1st Dept 2003]; *Sheila C. v Povich*, 11 AD3d 120 [1st Dept 2004], *citing Detone v Bullit Courier Serv., Inc.*, 140 AD2d 278, 279 [1st Dept1988], lv denied 73 NY2d 702 [1988]). Recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of a propensity to commit the alleged acts (*White v Hampton Management Co. L.L.C.*, *supra*).

With respect to negligent *hiring*, it is noted that "there is no common-law duty to institute specific hiring procedures unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" (*Lopez v New York City Dept. of Educ.*, Slip Copy, 2014 WL 1280268 (Table) [Supreme Court, Bronx County 2014]; *J.A. v City of New York*, 34 Misc 3d 1214(A), 946 NYS2d 67 (Table) [Supreme Court, Bronx County 2009]).

In support of their motion, defendants submitted sufficient proof of their lack of notice of any violent propensities of Dwyer prior to his hire *(see J.A. v. City of New York, supra)*.

Sanchez, the Employee Relations Supervisor for defendants, states in her affidavit that prior to hiring Dwyer on March 14, 2005, a background check was done in the normal course of business, and "said check did not reveal that he was involved in any crimes." The record indicates that Dwyer was subject to defendants' typical, and routine background check, which did not reveal any violent propensities. Plaintiff, in opposition, failed to submit any evidence on this narrow issue. Therefore, the branch of plaintiff's first cause of action alleging negligent *hiring* is severed and dismissed.

As to the negligent *retention and supervision* claims, Sanchez attests that Dwyer received

bi-annual reviews by his supervisors, and at "no time were there any complaints of violent behaviors that were reported to Empire about Mr. Dwyer. Empire was not aware of any violent behavior of Mr. Dwyer's and Empire did not have by reason to believe that Mr. Dwyer was going to engage in any violent behaviors."

Dittmer also testified at her deposition that as a supervisor for defendants, she hired installation coordinators and helped with "interviewing front-end staff, along with warehouse staff" (p. 16). She also provided on-site training to installation coordinators, such as Dwyer, "routes the work for the installer and deals directly with the installers" (pp.16-17; 18). Training typically took more than a week, depending upon "how quickly they were catching on" and involved "on-site training, shadowing" and providing a "DILO, which is, a day in the [life] of, which is what they were responsible for the day. It was a general on what they can expect . . . ." (pp. 19-20). She interviewed Dwyer for the installation coordinator position, which paid more than his accounting office position with defendants (pp. 22-23). Dwyer did not have any written disciplinary actions from her (p. 26), and she was not aware of any problems Dwyer had with getting along with other employees, and did not recall receiving any complaints about Dwyer or know of any violent tendencies of Dwyer (pp. 31-32). She had never heard of any other altercations or shouting between an installation coordinator and an installer (p. 54).

Dwyer testified at his deposition that he saw plaintiff sparingly from time to time, "maybe a couple of times a month" and did not have any conversations with him prior to the date of the incident (pp. 16-17). Along with the deposition testimony of defendants indicating that Dwyer had no prior history of violent physical propensities, plaintiff also stated that he never had any prior altercations with Dwyer. Plaintiff stated that he met Dwyer for the first time in 2006 when

plaintiff began working, and that he never had any altercations with him, verbal or physical, before the incident and Dwyer never insulted plaintiff before (p. 216). On all the occasions he observed Dwyer at the office, plaintiff never saw Dwyer get into any altercations with anyone (p. 217). Therefore, defendants met their burden of showing the absence of any prior notice of violent propensities of Dwyer.

However, plaintiff, in response, points to Dwyer's personnel file which contains the following records: (1) June 13, 2005, Employee Warning Notice: Dwyer "used profanity towards one of his co-workers" and was given a "Verbal warning"; (2) December 30, 2005 Performance Appraisal, Dwyer is "short" with hourly associates and "snap[s]" at them; "needs to find a way to release his stress" as he is in a "stressful position"; "needs to focus on stress management"; (3) October 16, 2006, Associate Warning Notice: Dwyer "used inappropriate language in the presence of other associates on October 13, 2006, and was overhead using inappropriate language towards one of our independent contractors" on October 16, 2006; (4) Dwyer "needs to focus on this area" of stress management; "He is sometimes perceived as being a "hot head" and needs to "work on his relationship with the installers."[4]

That Dwyer was urged, on more than one occasion, to learn deal with stress, was cited as using inappropriate and profane language on two occasions, and told to improve in his relations with the carpet installers, who considered him a "hot head," raises an issue of fact as to whether defendants were on prior notice of Dwyer's propensity to engage in violence (*cf. Ostroy v Six Square LLC*, 100 AD3d 493, 953 NYS2d 590 [1st Dept 2012] (dismissing claim of negligent

[4] The Court notes that the Dittmer signed the employee performance reviews, while the October 16, 2006 employee warning notice.

hiring, retention, training, and supervision as there was "no evidence that [employer] was on notice that [employee] had a propensity for violence"; "the record shows that [employee was regarded] as a normal and happy young man *who never displayed signs of anger or a bad mood*) (emphasis added)).

Plaintiff submitted sufficient evidence to raise a triable issue of fact as to whether defendants had notice of conduct by the individual defendant demonstrating a propensity for the type of conduct alleged (*see Mataxas v North Shore Univ. Hosp.*, 211 AD2d 762, 621 NYS2d 683 [1995]). Therefore, dismissal of the negligent retention and supervision claims is unwarranted.

Punitive Damages

"Punitive damages are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime" (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 [1993], quoting Prosser and Keeton, Torts § 2, at 9 [5th ed. 1984]). That author also teaches that: "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (Prosser and Keeton, Torts § 2, at 9-10 [5th ed.1984]).

Thus, the harmful conduct must be "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" (*McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 [1989]). Furthermore, an award of punitive damages must be supported by "clear,

unequivocal and convincing evidence" (*Munoz v Puretz*, 301 AD2d 382, 753 NYS2d 463 [1st Dept 2003]).

Further, it is well settled that the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]; *RTC Industries, Inc. v Goodtimes Home Video Corp.*, 1997 WL 35524 [SDNY 1997]).

Plaintiff failed to sufficiently state a cause of action for punitive damages. The allegations fail to indicate that defendants' behavior was "so outrageous as to evince a high degree of moral turpitude" (*see Rosenkrantz v Steinberg*, 13 AD3d 88, 786 NYS2d 35 [1st Dept 2004]; *see also Cohen v Mazoh*, 12 AD3d 296, 784 NYS2d 857 [1st Dept 2004] ["the facts alleged do not establish gross, wanton or willful fraud or other morally culpable conduct to a degree sufficiently warranting punitive damages"]). Nor are there any facts in the record to indicate that the alleged conduct was of an egregious nature, and aimed not solely at this plaintiff, but at the public, generally (*American Transitions. Co. v Associated International Ins. Co.*, 261 AD2d 251 [1st Dept 1999]; *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 [1st Dept 1992] [record does not support a finding of outrageous conduct warranting award of punitive damages]). Therefore, the claim for punitive damages is severed and dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants Empire Today, LLC (a Northlake, Illinois-based company) and Empire Today, LLC (a New York-based company) pursuant to CPLR 3211 and 3212 to dismiss the complaint and cross claims asserted against them is granted to the extent that all cross-claims, and plaintiff's cause of action on page 3 of the complaint premised on the theory of respondeat superior and claim for punitive damages are severed and dismissed; and it is further

ORDERED that the branch of the motion by defendants Empire Today, LLC (a Northlake, Illinois-based company) and Empire Today, LLC (a New York-based company) pursuant to CPLR 3211 and 3212 to dismiss the complaint and cross claims asserted against them is granted as to the portion of the cause of action on page 2 of the complaint premised on negligent hiring, and such claim is severed and dismissed; and it is further

ORDERED that the branch of the motion by defendants Empire Today, LLC (a Northlake, Illinois-based company) and Empire Today, LLC (a New York-based company) pursuant to CPLR 3211 and 3212 to dismiss the complaint and cross claims asserted against them is denied as to the cause of action on page 2 of the complaint premised on negligent

supervision and retention; and it is further

ORDERED that defendants 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.

Dated: April 8, 2014

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

HON. CAROL EDMEAD