

Bono v STLC 36th St. LLC

2014 NY Slip Op 33119(U)

March 20, 2014

Supreme Court, Queens County

Docket Number: 13306/2012

Judge: David Elliot

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liable for their actions; and (2) defendant was not negligent in the hiring, retention, or training of the unidentified security personnel.¹

Plaintiff testified to the following, in relevant part: that he arrived at Studio Square – a restaurant and beer garden located in the Astoria/Long Island City area of Queens – at approximately 11:30 P.M.; that he was celebrating the impending nuptials of his brother, along with friends and family, until the incident occurred between 3:00 and 3:30 A.M.; that, during that time, he had one drink; that he noticed about 9 to 12 bouncers working at Studio Square that night; that a person who he described as a 6'2, black, 300 to 350 lb., heavysset bouncer wearing a yellow shirt which read “Security” on it approached the group and asked them to leave the premises²; that plaintiff attempted to locate the manager who he initially saw behind the bar, but he could not be found; that, when he returned, he asked the bouncer to speak with a manager before being made to leave, at which point the bouncer told him to “stay out of it” and “do you want me to ruin your night?”; that three other bouncers were in the area during the verbal exchange; that the bouncer then struck plaintiff in the face and put his hands around his throat, pushed him against the wall, held him in place by his collarbone, and proceeded to punch him several more times; that a second bouncer screamed “someone grab Black,” at which point a short, muscular, Asian bouncer grabbed plaintiff, while the bouncer who assailed him left the scene; that plaintiff called the police, who arrived shortly thereafter; and that, despite the police calling all of the bouncers outside in an attempt to allow plaintiff to identify his assailant, only six were retrieved, none of which included those who were initially involved.

Anastasios Pavlou, chief operating officer of Studio Square also testified in this matter, to the following, in pertinent part: that defendant does not (and did not on the date of the incident) employ any security or bouncers nor does it contract with any security company; that it employs “floor managers” who can wear any color shirt they choose so long as it reads “Studio Square”; that on and around the time of the incident, there were no employees who wore yellow shirts which read “Security” on them but, rather, they say “Staff”; that it is the job of all employees to ensure that no one fights in Studio Square and

1. It would appear that, though intimidated by counsel in her memorandum of law, defendant is not taking the position that the persons who are alleged by plaintiff to be employees thereof were not, in fact employees but, rather, is taking the position that they were third-parties not otherwise employed by defendant. Same carries an entirely different burden of proof on a summary judgment motion (*see e.g. Davis v Rochdale Village, Inc.*, 83 AD3d 991 [2011]; *Bryan v Crobar*, 65 AD3d 997 [2009]).

2. According to plaintiff, the bouncer believed that someone in plaintiff’s group struck another patron with a beer mug, which plaintiff denies.

that, if there is an altercation, those persons are asked to leave; that, typically, if a serious incident happens in which someone gets hurt, an incident report would be generated; that, he was made aware on the date of the incident that a quarrel ensued and that those people were asked to leave; that there is no incident report regarding plaintiff's injuries; and that he could not recall whether there were any African American or Asian males working on the night of the incident.

Mr. Pavlou also submitted an affidavit in which he detailed defendant's hiring and training procedures for floor managers, referring also to the employee handbook. Mr. Pavlou explained that, before hiring a floor manager, references were checked and, if a reference yielded negative information, that person would not be hired. Further, if a prospective employee did not complete on-the-job three week training, that person would not be hired. Also, if a floor manager displayed any aggressive behavior during employment, that person would be terminated. Finally, the employee handbook, which was given to every newly hired floor manager, specifically prohibited threats or physical violence toward Studio Square clients.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only if it meets this burden will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman v City of New York, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

As to plaintiff's claim that defendant should be held liable for the actions of its employees "[u]nder the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; see also *Gui Ying Shi v McDonald's Corp.*, 110 AD3d 678 [2013]; *Horvath v L & B Gardens, Inc.*, 89 AD3d 803 [2011]; *Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875 [2006]). "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his [or her] employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment" (*Davis v Larhette*, 39 AD3d 693 [2007]; see *Gui Ying Shi*, 110 AD3d at 679). Finally, liability will not attached if the employee is acting solely for

personal motives which are unrelated to the furtherance of the employer's business (*see Gui Ying Shi*, 110 AD3d at 679; *Horvath*, 89 AD3d at 803).

While defendant's position is that the acts of the assailant(s) fell outside of the scope of the business of Studio Square in that the use of physical violence was specifically prohibited, there still remain several material issues of fact which cannot be resolved on a motion for summary judgment. Notably, there is an issue of fact as to whether the floor managers acted in a security capacity for the benefit of Studio Square. As can be gleaned from plaintiff's testimony, and as also detailed in both his affidavit and the affidavit of his witness – submitted in opposition to the motion – the presence of employees responsible for security was evident both on the date of the incident as well as on prior occasions. Furthermore, both plaintiff and the witness indicated that these bouncers “were known to be security and known to be aggressive in their tactics.” Thus, there is clearly an issue of fact for the jury to determine whether the use of aggression or physical violence was within the scope of defendant's employment and, thus, whether defendant is to be held vicariously liable therefor (*see Gui Ying Shi*, 110 AD3d at 679; *Giambruno v Crazy Donkey Bar and Grill*, 65 AD3d 1190 [2009]; *White v Jamil Abdo Alkoutayni*, 18 AD3d 540 [2005]). Finally, it should be noted that the fact that there is conflicting testimony as to whether there were bouncers employed at all (and, more particularly, on the date of the incident), raises questions of credibility which cannot be resolved here (*see e.g. Gill v Scooby's Bar & Lounge, Inc.*, 32 Misc 3d 1204 [A] [Sup Ct Queens County 2011]).

Turning now to the issue of negligent hiring and retention, to be held liable for such claims, it must be shown that the employer knew or should have known the employee's propensity for the kind of behavior which caused plaintiff's injuries (*see Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875 [2006]; *Peter T. v Children's Vil., Inc.*, 30 AD3d 582 [2006]; *Ghaffari v North Rockland Cent. School Dist.*, 23 AD3d 342 [2005]). “The employer's negligence lies in his having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of his employees” (*Detone v Bullit Courier Serv.*, 140 AD2d 278 [1988]; *see Sandra M.*, 33 AD3d at 878-879).

Here, while defendant has outlined its general procedures with respect to hiring and retention of employees, defendant has failed to offer any evidence with respect to the particular employees alleged to be involved in the subject accident. Defendant has not proffered a scintilla of evidence that any search whatsoever was conducted with respect to the bouncers (or floor managers, as it may be) who were working on the date of the incident and that those employees were properly hired and retained. It is noted that it is not plaintiff's

burden, on this motion, to establish that those particular employees were negligently hired or retained.

Accordingly, defendant's motion for an order granting it summary judgment dismissing the complaint is denied.

Dated: March 20, 2014

J.S.C.