

Augustine v Carter

2014 NY Slip Op 33632(U)

September 24, 2014

Supreme Court, New York County

Docket Number: 101660/12

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

EA
9/29/14
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 12
RECEIVED
SEP 29 2014 INDEX NO. 101660/12
MOTION DATE
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL
MOTION SEQ. NO. 003

Index Number : 101660/2012
AUGUSTINE, ARTHUR
vs.
CARTER, JOHN A.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

The following papers, numbered 1 to 5/1, 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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
SEP 29 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/24/14

[Signature], J.S.C.
BARBARA JAFFE
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
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X

ARTHUR AUGUSTINE and MEREDITH WARREN,

Index No. 101660/12

Plaintiffs,

Mot. seq. no. 003

- against -

DECISION AND ORDER

JOHN CARTER, MICHAEL SIEGEL, a/k/a MIKE SIEGEL,
and MIKE SIEGEL TRUST,

Defendants.

-----X

BARBARA JAFFE, J.:

For plaintiffs:
Carlos M. Carvajal, Esq.
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212-381-9210

FILED
SEP 29 2014
NEW YORK
COUNTY CLERK'S OFFICE

For Siegel:
William J. Balletti, Esq.
Nicholas Gisonda, Esq.
Gannon Rosenfarb *et al.*
William St., 7th Fl.
New York, NY 10038
212-655-5000

Defendants Michael Siegel, a/k/a Mike Siegel and Mike Siegel Trust (collectively, Siegel) move pursuant to CPLR 3212 for an order granting them summary dismissal of plaintiffs' complaint against them. Plaintiffs oppose.

I. BACKGROUND

On or about May 5, 2006, Siegel, owner of the building located at 111 South Street in Manhattan, entered into a lease with Bodur Real Estate Inc., whereby Bodur rented the entire building, with Siegel retaining rights to enter at reasonable times and approve renovations. Defendant Carter signed on behalf of Bodur. (Affirmation of William J. Balletti, Esq., in Support of Motion for Summary Judgment, dated March 13, 2014 [Balletti Aff.], Exh. H).

Plaintiff Warren leased an apartment in the building from Carter. Plaintiff Augustine moved in with her. Carter commenced a summary nonpayment proceeding against plaintiffs, and plaintiffs counterclaimed, alleging that Carter had failed to repair defects in the apartment. On the evening of September 25, 2009, Carter attacked plaintiffs with a tire iron.

On or about February 14, 2012, plaintiffs commenced this personal injury action against Carter, alleging battery, and against Siegel, alleging negligent hiring. (Balletti Aff., Exh. A).

At an examination before trial (EBT) held on September 20, 2013, Augustine testified that he paid rent to Carter and assumed that he was the superintendent of the building. He recounted that on the night of the incident, he spoke with Carter about when he would perform the repairs. Then, as he was about to enter the building, Carter drove up, removed a tire iron from his trunk, and hit him with it several times. (Balletti Aff., Exh. D).

At an EBT held the same date, Warren testified that she saw Carter attack Augustine, and when she tried to intercede, Carter hit her too. She believes having heard that Siegel had previously witnessed Carter become violent with a tenant and also recalls hearing that Carter had once threatened and assaulted a tenant's boyfriend for failing to pay rent. (Balletti Aff., Exh. E).

At an EBT held on September 25, 2013, Siegel testified that the building has a commercial space on the first floor and three apartments above, that Carter had inquired about renting the premises for purposes of opening a restaurant on the first floor, and that he had represented himself as having been in the restaurant business in Florida. Siegel performed no credit or background check on Carter or Bodur, and he denied ever seeing Carter engage in a physical altercation, or knowing Carter's tenants. (Balletti Aff., Exh. F).

II. CONTENTIONS

Siegel denies any liability for Carter's assaultive conduct, which occurred outside the building, and was not engaged in for his benefit. He disclaims any duty to protect plaintiffs from the criminal actions of third parties, asserts that Carter was not his employee, and denies any duty to inquire into Carter's criminal background. (Memorandum of Law in Support of Motion for Summary Judgment of William J. Balletti, Esq., dated March 13, 2014).

Plaintiffs, in opposition, allege that Siegel's retention of a right to enter the building and approve renovations establishes his control over the premises, thereby imposing on him a duty of reasonable care to plaintiffs, which he breached by failing to perform any background or credit check on Carter or Bodur or otherwise vetting Carter prior to signing the lease, despite being aware of Carter's violent history. (Affirmation in Opposition to Summary Judgment of Carlos M. Carvajal, Esq., dated May 4, 2014).

In reply, Siegel observes that plaintiffs have not refuted that the altercation occurred off-premises, that there is no allegation that a dangerous condition caused plaintiffs' injuries, and he reiterates the arguments submitted initially. (Reply Affirmation of William J. Balletti, Esq., dated May 9, 2014).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial;

unsupported allegations are insufficient. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Negligence arises from a duty, a breach thereof, and an injury proximately caused thereby. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). Absent a duty, there is no liability (*Palsgraf v Long Is. R. Co.*, 248 NY 339, 342 [1928]), and whether a duty exists constitutes a legal question for the court (*Eiseman v State*, 70 NY2d 175, 187 [1987]). “Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises.” (*Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 [1st Dept 2006]).

Here, as it is undisputed that the assault occurred outside the premises, Siegel’s ownership of the building is immaterial. And, absent an employer-employee relationship between Siegel and Carter, there can be no cause of action for negligent hiring. (*See Francella v Crotona Ave. Corp.*, 44 AD2d 660 [1st Dept 1974] [overturning jury finding of liability for negligent hiring as plaintiff failed to demonstrate, among other things, existence of employer-employee relationship]; *Morgan v Williams*, 26 Misc 3d 1217[A], 2010 NY Slip Op 50116[U] [Sup Ct, Broome County] [defendants entitled to summary judgment on negligent hiring and vicarious liability claims in absence of employer-employee relationship]). That plaintiffs thought that Carter was the building’s superintendent is also immaterial. In any event, plaintiffs do not dispute that Carter committed the assault in the furtherance of his own interests. Thus, Siegel cannot be held vicariously liable for it. (*Cf. Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999] [no vicarious liability claim against employer, as employee’s alleged sexual assault of

plaintiff clearly “departed from his duties for solely personal motives”]).

Given this result, I need not address the remaining contentions.

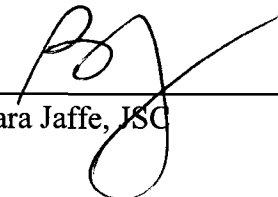
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Michael Siegel, a/k/a Mike Siegel and Mike Siegel Trust’s motion for summary judgment dismissing plaintiffs Arthur Augustine and Meredith Warren’s complaint is granted in its entirety and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

DATED: September 24, 2014
New York, New York

FILED
SEP 29 2014
NEW YORK
COUNTY CLERK'S OFFICE