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STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

JEFFREY JACKSON,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 818-12
RJI No.: 01-12-106121

OCEAN STATE JOB LOT OF NY2011 LLC, CHAD SNYDER and JOHN DOE,

Defendants.

(Supreme Court, Albany County All Purpose Term)

Appearances:

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HANNIGAN LAW FIRM PLLC
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Roger D. McDonough, J.:

Defendants[1] seek summary judgment dismissing the complaint. Plaintiff opposes the motion.

Background

Plaintiff traveled to the Albany Ocean State Job Lot store ("Ocean State") on November 1, 2011 for the purpose of shoplifting. He was unable to recall how many items he actually took, but does recalling stealing cosmetic items. Defendant Snyder and two other Ocean State employees stopped plaintiff as he was exiting the store. The plaintiff was then escorted inside the store to a back office. Plaintiff was kept in the back office for approximately ten minutes until the Albany police arrived and arrested him. The instant litigation ensued.

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[1] Plaintiff's attempt to amend his amended complaint so as to name the "John Doe" defendant was unsuccessful.

Plaintiff brings two causes of action. The first cause of action seeks recovery against all defendants for assault and battery. The second cause of action seeks recovery against Ocean State for negligent hiring, supervision and training of its employees.

Discovery has been completed and the matter is scheduled for a January 26, 2015 jury trial.

Summary Judgment Standard

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegard v. New York Univ. Med. Center, 64 NY2d 851 [1985]).

Once such a showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof, in admissible form, to establish the existence of material issues of fact which require a trial (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue. Averments merely stating conclusions are insufficient (Bethlehem Steel Corp. v. Solow, 51 NY2d 870 [1980]; Capelin Assoc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v. Cornell University, 162 AD2d 922, 923 [3rd Dept. 1990]). The focus is upon issue finding, not issue resolving, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (see, B. S. Industrial Contractors, Inc. v. Town of Wells, 173 AD2d 1053 [3rd Dept. 1991]).

Discussion

Assault/Battery Cause of Action

In plaintiff's verified complaint, he describes his interactions with Ocean State's loss prevention officers as follows: (1) he was suddenly and aggressively grabbed by defendant Snyder and defendant Doe as he walked out of the store; (2) he raised his hands in "surrender"

and did not resist or attempt to flee; (3) he was shoved and pin face-first against a plate glass window; (4) he was paraded to the back of the store by his belt while defendant Snyder yoked his neck; (5) he was thrown onto a chair in a back office; and (6) he was physically searched and had his belongings removed from his pockets. Similarly, in his verified bill of particulars, plaintiff indicated that defendants assaulted and battered him in the following ways: (1) grabbing him by the shirt and neck; (2) shoving and pinning him against a window; (3) yoking him by the neck; (4) grabbing him by the belt; (5) throwing him into a chair; and (6) physically searching him and removing his belongings. In his deposition testimony, he indicates that he was approached by two individuals as he stepped outside the store. He further indicates that he threw his hands up and was then treated very aggressively and thrown up against the window. When he was first approached he indicates that one of the individuals grabbed him while the other guy came behind him and grabbed him by his neck. He also testified that he was thrown into a chair in a back office of the store.

Defendants counter plaintiff's version of the incidents with the deposition testimony of defendant Snyder as well as a videotape of several of the incidents in question. Snyder testified, in relevant part, as follows: (1) he observed plaintiff select and conceal merchandise within the store; (2) he was on the sidewalk near the exit door when plaintiff exited the store; (3) he identified himself as "Ocean State security" and asked plaintiff to remove the unpaid merchandise; (4) plaintiff looked like he wanted to run, but did not actually run; (5) plaintiff did not give the merchandise back and was unwilling to come to the back of the store; (6) plaintiff's fist went near Snyder's face; (7) Snyder grabbed plaintiff's wrist; (8) there was a struggle and another loss prevention officer stated for someone to secure plaintiff's wrists; (9) he believes someone secured plaintiff's wrist or wrists; (10) merchandise started falling from plaintiff to the ground; (11) plaintiff was escorted to the back office and the police were called; (12) he did not search plaintiff and does not recall any store employees searching plaintiff.

The two versions of the incidents in question leave the Court with issues of credibility that cannot be resolved on a summary judgment motion (*see generally*, Barrett v Watkins, 82 AD3d 1569, 1572 [3rd Dept. 2011]). Courts are simply not allowed to assess credibility on this type of motion, absent a clear appearance that the factual issues are feigned (*see*, Dillenbeck v

Shovelton, 114 AD3d 1125, 1127 [3rd Dept. 2014]). Neither defendant Snyder's deposition testimony nor the videotape have persuaded the Court that plaintiff's version of the events is, as a matter of law, incredible.

The Court notes that two statutes provide some guidance as to assault/battery claims brought against a store and/or loss prevention officers. New York's General Business Law § 218 provides, in relevant part, as follows:

> In any action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights, brought by any person by reason of having been detained on or in the immediate vicinity of the premises of (a) a retail mercantile establishment for the purpose of investigation or questioning as to criminal possession of an anti-security item as defined in section 170.47 of the penal law or as to the ownership of any merchandise, or (b) a motion picture theater for the purposes of investigation or questioning as to the unauthorized operation of a recording device in a motion picture theater, it shall be a defense to such action that the person was ***detained in a reasonable manner*** and for not more than a reasonable time to permit such investigation or questioning by a peace officer acting pursuant to his special duties, police officer or by the owner of the retail mercantile establishment or motion picture theater, his authorized employee or agent, and that such officer, owner, employee or agent had reasonable grounds to believe that the person so detained was guilty of criminal possession of an anti-security item as defined in section 170.47 of the penal law or was committing or attempting to commit larceny on such premises of such merchandise or was engaged in the unauthorized operation of a recording device in a motion picture theater. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person (i) has concealed possession of unpurchased merchandise of a retail mercantile establishment, or (ii) has possession of an item designed for the purpose of overcoming detection of security markings attachments placed on merchandise offered for sale at such an establishment, or (iii) has possession of a recording device in a theater in which a motion picture is being exhibited and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise, or possession of such an item or device . . . (emphasis supplied).

Penal Law § 35.30(4) provides, in relevant part, as follows:

> A private person acting on his or her own account may use physical force, other than deadly physical force, upon another person when and to the extent that he or she ***reasonably believes*** such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he or she reasonably believes to have

committed an offense and who in fact has committed such offense . . . (emphasis supplied).

The Court finds that the wording of both statutes, particularly in this case where there are differing factual versions of plaintiff's encounter with defendants, necessitate resolution of the reasonableness issues by a fact finder. Additionally, the Court is partially guided by the caselaw concerning civil matters against police officers for assault/battery/excessive force. Such cases, similar to the instant one, involve split-second judgments in tense, uncertain and rapidly evolving circumstances (*see*, Graham v Connor, 490 U.S. 386, 396-397]). In such cases, the question of the reasonableness of the force used is generally left for a jury to decide because of their "intensely factual nature" (*see*, Holland v City of Poughkeepsie, 90 AD3d 841, 844 [2nd Dept. 2011]).

Defendants' remaining arguments have been considered and found to be insufficient to warrant summary judgment as to the first cause of action. Additionally, the Court did not find the store videotape to be dispositive of any of the factual issues.

Based on all of the foregoing, summary judgment dismissing the first cause of action must be denied.

Negligent Hiring/Supervision/Training Cause of Action

Claims based on negligent hiring/supervision require a showing that "defendants knew of the employee's propensity to [commit the alleged acts] or that defendants should have known of such propensity had they conducted an adequate hiring procedure" (Ray v County of Delaware, 239 AD2d 755, 757 [3rd Dept. 1997]). Similarly, as to negligent training, it must be demonstrated that the employer "knew or should have known of the employee's propensity for the conduct which caused the injury" (Kinge v State of New York, 79 AD3d 1473, 1476 [3rd Dept. 2010] [internal quotation marks and citations omitted]). Ocean State adequately supported their motion with the deposition testimony of defendant Snyder. Snyder's deposition testimony established that he'd worked as a loss prevention specialist since 1995 and had never been disciplined nor had ever received any negative "write-ups" during his loss prevention career. The Court finds this factual submission to be sufficient for Ocean State's initial summary judgment burden as to the negligent hiring/supervision/training claim (*see*, Honohan v Martin's Food of

South Burlington Inc., 255 AD2d 627, 628 [3rd Dept. 1998]). Plaintiff failed to counter Ocean State's showing with any evidence of Snyder's, or any other Ocean State employee's, propensity to commit the alleged acts or that Ocean State should have known of such propensity (*see*, Id.). Rather, plaintiff's proof focused entirely on the alleged incident itself and Ocean State's reaction to the incident.

Accordingly, summary judgment dismissing the second cause of action must be granted.

Based upon the foregoing, it is hereby

ORDERED that defendants' motion is hereby granted as to the first cause of action and is otherwise denied.

This shall constitute the Decision and Order of the Court. The original decision and order is being returned to counsel for plaintiff who is directed to enter this Decision and Order without notice and to serve defendants' counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order and the papers considered to the County Clerk. The signing of the decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER.

Dated: Albany, New York
January 8, 2015

R.D.M.

Roger D. McDonough
Acting Supreme Court Justice

1-16-15