

Paiba v FJC Sec., Inc.
2015 NY Slip Op 30383(U)
February 24, 2015
Supreme Court, Bronx County
Docket Number: 306872/2012
Judge: Mary Ann Brigantti
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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti

-----X
SONIA PAIBA,

Plaintiff,

-against-

DECISION / ORDER

Index No. 306872/2012

FJC SECURITY, INC., and THE CITY OF NEW YORK,

Defendants
-----X

The following papers numbered 1 to 7 read on the below motions noticed on February 25, 2014 and duly submitted on the Part IA15 Motion calendar of **November 6, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
FJC's Notice of Motion, Exhibits	1,2
Pl.'s Aff. in Opp., Exhibits	3,4
City's Aff. in Opp., Exhibits	5,6
FJC's Aff. in Reply.	7

Upon the foregoing papers, defendant FJC Security Services, Inc. ("FJC") moves for summary judgment, dismissing the complaint of the plaintiff Sonia Paiba ("Plaintiff") and all cross-claims, pursuant to CPLR 3211 and 3212. Plaintiff, as well as co-defendant the City of New York ("City") oppose the motion.

I. Background

This action arises out of an alleged incident that occurred on October 24, 2011, when Plaintiff was within the premises of the Melrose Job Center on East 161st Street in the Bronx. According to the Notice of Claim, Plaintiff was "negligently assaulted, restrained, and falsely imprisoned by Security Guards hired and employed by the City of New York..." Plaintiff later filed a summons and complaint against the City and FJC. In the complaint, Plaintiff contends, *inter alia*, that she was assaulted by security guards employed by FJC, an entity hired by the City for security services at the subject premises.

FJC initially argues that they are entitled to dismissal of the complaint because they do not owe Plaintiff a duty of care under these circumstances. Here, Plaintiff alleges that she was

negligently assaulted, restrained, and falsely imprisoned by security guards at the Melrose Job Center. FJC provides affidavits from Solomon Ogundenko and Noel Cruz, who were at the scene of the alleged incident, and state that no one from FJC was involved or had any physical contact with Plaintiff at any time. Based on their contract with the City, no security guards from FJC were authorized to physically intervene during altercations. FJC also argues that, as a contractor, it generally cannot be held liable in tort or breach of contract for injuries sustained by Plaintiff, a non-contracting third party (citing, among other cases, *Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253 [2007]). FJC contends that this matter does not fall within any of the exceptions to this general rule.

In opposition, Plaintiff argues that, essentially, FJC has not satisfied its prima facie burden of proof. The affidavits submitted are self-serving, not based on personal knowledge, or cannot be reconciled with the Plaintiff's 50-h hearing testimony. Plaintiff also urges that discovery is ongoing and no depositions have been held. Plaintiff cites the FJC - City contract, which contains provisions detailing the required training for FJC security guards and the requirement that they, among other things, "de-escalate verbal or physical confrontations or altercations" that may require "minimum physical intervention." The City also opposes the motion, and argues, *inter alia*, that the City has not conclusively established "zero liability" and the motion is premature.

In a reply affirmation, FJC contends that the opponents to the motion have failed to demonstrate that FJC owed a duty to the Plaintiff under these circumstances. FJC also argues that if its motion, is denied, the City's motion for summary judgment (separately filed and decided by this Court), should also be denied.

II. Applicable Law and Analysis

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial

of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 20, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

To the extent that FJC is seeking dismissal pursuant to CPLR 3211, it had the burden of submitting documentary evidence that conclusively establishes a defense to the asserted claims as a matter of law (see *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

In this matter, the affidavits submitted by the movant fail to eliminate all triable issues of fact as to whether FJC security guards were involved in this alleged incident and thus, "launched a force or instrument of harm" so as to be liable to the plaintiff, a third party to the FJC - City contract (see *Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, citing *Espinal v. Melville Snow Constr.*, 98 N.Y.2d 136 [2002]). Mr. Ogudenko did not personally witness the incident, and Mr. Cruz offers only self-serving conclusions (see *Ocasio ex rel. Rosado v. Town of Greenburgh*, 79 A.D.3d 426 [1st Dept. 2010]). While FJC contends that they "were not permitted to physically interact with clients" at the site, they do not cite to any specific language in the contract supporting this contention, and instead submit the entire contract without reference to any specific section, paragraph, or page number. In any event, summary disposition at this juncture would be premature before completion of discovery (CPLR 3212[f]), as Plaintiff's testimony at her 50-h hearing conflicts with the affidavit of Mr. Cruz as to the number of officers involved in this incident and their identities.

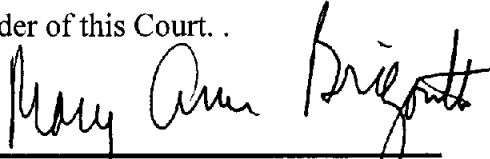
III. Conclusion

Accordingly, it is hereby

ORDERED, that defendant FJC's motion for summary judgment and/or to dismiss, pursuant to CPLR 3211 and 3212, is denied.

This constitutes the Decision and Order of this Court. .

Dated: 2/24, 2015



Hon. Mary Ann Brigantti, J.S.C.