Singh v Alliance Bldg. Servs., LLC
2016 NY Slip Op 30819(U)
May 2, 2016
Supreme Court, New York County
Docket Number: 152773/12
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

---------- X

GURPREET SINGH

Index No. 152773/12
Motion Seq: 014

Plaintiff,

- against-

ALLIANCE BUILDING SERVICES, LLC, FIRST QUALITY MAINTENANCE, L.P. and DAVID DIAZ,

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendants.

---------- X

The motion by Alliance Building Services, LLC, First Quality Maintenance, L.P., and David Diaz (defendants) for summary judgment is granted to the extent that plaintiff's claims for negligent hiring, prima facie tort and intentional infliction of emotional distress are dismissed. Defendant's motion is denied with respect to plaintiff's respondeat superior claim.

This action arises out of an altercation that occurred between Mr. Diaz and plaintiff after a motor vehicle accident involving both of them on April 27, 2012. Mr. Diaz was an employee for defendant First Quality Maintenance (FQM). Mr. Diaz's job as an operations executive required him to drive to various building in New York City and perform inspections to ensure that the buildings were properly maintained. Plaintiff was a taxi driver.

The facts surrounding the altercation between Mr. Diaz and plaintiff are disputed. Plaintiff claims that he was attacked by Mr. Diaz after a verbal argument following the motor vehicle accident. Defendants acknowledge that Mr. Diaz kicked plaintiff in the face, but assert

that Mr. Diaz acted in self-defense.[1] Plaintiff claims that the testimony of non-party witness John Czachor establishes that Mr. Diaz's actions were not in self-defense. Mr. Czachor claims that Mr. Diaz kicked plaintiff in the face while plaintiff was reaching down to pick up his glasses. Plaintiff claims that Mr. Diaz kicked plaintiff while plaintiff was looking away. Plaintiff asserts that Mr. Diaz's kick caused multiple facial fractures as well as nose and face injuries.

To be entitled to the 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 Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99

---

[1]Defendants assert that Mr. Diaz was arrested and charged with 3rd degree assault following the incident. Mr. Diaz claimed that he was acting in self-defense. A jury later acquitted Mr. Diaz.

NY2d 647, 760 NYS2d 96 [2003]).

Negligent Hiring

"An employer may be liable for negligent hiring when it knew or should have known of the employee's propensity to commit injury even if the injury committed was not identical to the prior injury"(*Doe v Goldweber*, 112 AD3d 446, 447, 976 NYS2d 77 [1st Dept 2014]). "[K]nowledge, actual or constructive, cannot be inferred from the mere happening of the incident complained of" (*Santamarina v Citrynell*, 203 AD2d 57, 59, 609 NYS2d 902 [1st Dept 1994]).

Defendants claim that there is no evidence that it knew or should have known of Mr. Diaz's propensity to commit injury when it hired Mr. Diaz. Defendants point out that Mr. Diaz's background check came back negative, which indicated a lack of criminal history. Defendants have made a prima facie showing that they are entitled to summary judgment. The burden shifts to plaintiff to raise a triable factual issue.

In opposition, plaintiff argues that defendants did not provide background check documents or documents relating to Mr. Diaz's performance evaluations.

Plaintiff has failed to raise an issue of fact. Defendants have attached Mr. Diaz's background check report (*see* affirmation of defendants' counsel, exhibit L), which purports to show that Mr. Diaz had no criminal history. Further, plaintiff appears to be conflating a negligent hiring claim with a negligent retention claim. However, plaintiff's verified complaint only contains a cause of action for negligent hiring. Therefore, plaintiff's claims about Mr. Diaz's performance evaluations are not relevant to defendants' knowledge ***at the time they hired Mr. Diaz.*** Mr. Diaz's background check makes clear that defendants did not know or should not have known of any alleged propensity for violence by Mr. Diaz. Plaintiff's claim for negligent hiring

is dismissed.

Prima Facie Tort

"The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-43, 490 NYS2d 735 [1985]). "'[P]rima facie tort should not become a catch-all alternative for every cause of action which cannot stand on its own legs'" (*id.* at 143 quoting *Belsky v Lowenthal*, 62 AD2d 319, 323, 405 NYS2d 62 [1st Dept 1978]). "[W]here a traditional tort remedy exists, a party will not be foreclosed from pleading, as alternative relief, a cause of action for prima facie tort" (*id.*).

Defendants argue that plaintiff's allegations sound in assault and battery and, therefore, the cause of action for prima facie tort should be dismissed. Plaintiff argues that it is permitted to assert a claim for prima facie tort in the alternative to its other claims.

Plaintiff fails to raise an issue of fact and plaintiff's claim for prima facie tort is dismissed. "Prima facie tort was designed to provide a remedy for intentional and malicious acts that cause harm and for which no traditional tort provides a remedy" (*Kickertz v. New York Univ.*, 110 AD3d 268, 277, 971 NYS2d 271 [1st Dept 2013] [internal quotations and citation omitted]). Here, plaintiff has alleged multiple tort theories under which he can seek a remedy, including assault and battery.

Intentional Infliction of Emotional Distress

At oral argument, plaintiff withdrew the claim for intentional infliction of emotional distress. Therefore, this claim is dismissed.

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, 745, 801 NYS2d 566 [1st Dept 2005] [internal quotations and citations omitted). To determine whether the act was in the scope of employment a court must consider:

> "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 that the employer could reasonably have anticipated"

(*Riviello v Waldron*, 47 NY2d 297, 303, 418 NYS2d 300 [1948]). "And, because the determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury" (*id.*).

Defendants argue that Mr. Diaz's conduct was not in the scope of his employment because the conduct was not in furtherance of his employer's business and that Mr. Diaz's personal motives constitute a clear departure from his normal job responsibilities. Defendants further argue that Mr. Diaz's actions were not part of the type of conduct required to fulfill his duties as an operations executive.

In opposition, plaintiff claims that Mr. Diaz was on duty when the incident occurred and driving a company car.

Plaintiff has raised an issue of fact. Mr. Diaz was working when the incident occurred and his job required him to drive to various buildings. Although Mr. Diaz's action may be seen as a substantial deviation from his usual performance, it was reasonably foreseeable that defendant

might get into a motor vehicle accident while driving in New York City (*cf. Goldberg v Sulzberger-Rolfe, Inc.*, 212 AD2d 408, 408, 622 NYS2d 272 [1st Dept 1995]). It may have been foreseeable that Mr. Diaz would get into an altercation following a motor vehicle accident. It is up to a jury to decide whether Mr. Diaz's actions, committed while on duty, were part of the scope of his employment.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's claims for prima facie tort, negligent hiring, and intentional infliction of emotional distress are dismissed; and it is further

ORDERED that defendants' motion for summary judgment is denied with respect to plaintiff's claim for respondeat superior.

This is the Decision and Order of the Court.

Dated: May 2, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC