Flores v Dubon
2016 NY Slip Op 32086(U)
May 17, 2016
Supreme Court, Queens County
Docket Number: 13565/2013
Judge: David Elliot

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ANDRES FLORES,
Plaintiff(s),

- against -

DAVID DUBON, et al.,
Defendant(s).

Index
No. 13565 2013

Motion
Date April 19, 2016

Motion
Cal. No. 58

Motion
Seq. No. 3

The following papers numbered 1 to 10 read on this motion by defendants Luis and Marina Urteaga (the Urteagas) for an order granting them summary judgment dismissing the complaint and all cross-claims against them.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-7
Reply.....	8-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries stemming from an alleged altercation which occurred on August 5, 2012, at approximately 9:00 p.m., on the sidewalk in front of the premises located at 193-10 45th Avenue, Bayside, New York. The Urteagas own the premises and reside on the second floor. Plaintiff and his then-girlfriend and now wife, Amanda Liebowitz (Liebowitz), rented a room on the first floor. According to the complaint, at the aforesaid date, time, and place, defendants David Dubon (Dubon), who is the Urteagas' son, and Andrew Bennett (Bennett), who was the then-

boyfriend of Dubon's sister Yvette – both acting as agents, servants, and/or employees of the Urteagas – physically attacked plaintiff. Plaintiff asserts the following causes of action: (1) assault as against Dubon and Bennett; (2) battery as against Dubon and Bennett; (3) negligence as against Dubon and Bennett, as well as a claim against the Urteagas under the theory of respondeat superior and negligent supervision; and (4) intentional infliction of emotional distress (IIED) as against all defendants. The Urteagas now move for summary judgment dismissing the third and fourth causes of action against them.

According to plaintiff's testimony, he and Liebowitz became tenants on the first floor of the premises commencing in January 2012. There was a common kitchen/dining room for all tenants to use. Each month, plaintiff would go upstairs and give the Urteagas rent. Initially, he paid in cash, but he switched to money order, which the Urteagas did not like. He never submitted the rent to anyone else. Plaintiff first met Dubon when the latter came to set up a cable line for one of the other tenants, and he first met Bennett two to three weeks before the incident. Dubon would come to the premises three to four times per week, and would sometimes stay the night upstairs. Otherwise, plaintiff saw Dubon two or three times collect rent from a few of the other tenants and perform small repairs around the premises. Dubon never indicated that he worked for the Urteagas, only that he was their son. He did state to plaintiff that, if plaintiff had any complaints, he was to speak to Mr. Urteaga or himself. He did not see the Urteagas telling Dubon or Bennett to do work around the house, nor did they indicate that they were paid for any work they did for the Urteagas. Both Dubon and Bennett, as well as the Urteagas, would intimidate plaintiff. As a result, he, or Liebowitz, telephoned the police between three and five times. The first time was because Mr. Urteaga entered the first floor without prior notification at 12:30 a.m. to bang on another tenant's door; plaintiff stated that "they sent somebody to attack the tenant that [Mr. Urteaga] had something to say about that night." Subsequent calls were made due to the fact that Mr. Urteaga would enter the apartment "at all hours of the night" without permission or because he would go into another tenant's room. After plaintiff threatened to stop paying rent, Mrs. Urteaga came to plaintiff's bedroom window and started knocking on it repeatedly in an attempt to make amends. As a result, he went outside to speak with Dubon so that he may advise his mother to stop "harassing" him, at which point Dubon "verbally assaulted" him and attempted to physically do so as well. This caused plaintiff to again call the police. When the police came, Dubon held himself out as the landlord of the premises. Plaintiff again called the police was when Dubon and Bennett appeared to threaten his life. Thereafter, plaintiff was served with a Notice to Vacate the premises for his failure to pay rent. On the night of the incident, plaintiff was with two friends and one of their daughters waiting for Liebowitz to come outside to go to dinner. Plaintiff parked the car on the corner of 45th Avenue and 193rd Street. He stepped out of the car with his friend to smoke a cigarette when Dubon and Bennett walked out of the house and Dubon said "Why don't you come over here, I have something to tell you." When plaintiff declined, they walked towards him and Bennett

said "I heard you called the police." At that point, both Dubon and Bennett started punching him. After the altercation, Dubon told him to get out of his house, and Dubon and Bennett fled the scene. He did not see the Urteagas there at the time of the incident. However, when he came to the premises to collect some clothing, Mr. Urteaga was present and indicated that plaintiff "got what [he] deserved." In plaintiff's opinion, this statement was "to me sufficient enough to know that he had said something to them or asked them to do something to me." In terms of "extreme and outrageous" behavior, plaintiff testified that the Urteagas came into the apartment at all hours, and that they turned off the central air conditioning, especially during the beginning of the summer.

Mr. Urteaga also testified in this action. He stated that he has owned the premises with his wife since 1983. Around the time of the incident, Dubon stayed with the Urteagas on the second floor approximately three nights per week, and he stayed at another property Mrs. Urteaga owned for the remaining days. Mr. Urteaga had no relationship with Bennett and only knew him to be Yvette's friend. Dubon never collected rent, dealt with tenants, or otherwise managed or maintained the premises; Dubon would only do favors for him as his son. Rather, it was Mr. Urteaga who was responsible for management of the premises, including the collection of rent from tenants. Only he and the tenants had access to the keys to the first floor apartment and the respective rooms therein. The only times he would go to the first floor apartment was to collect rent, to give the tenants the electric bill, to check on any noises he might have heard, and to ensure that utilities were in perfect working order. He would never enter tenants' rooms. He would also go into the kitchen or bathroom (which were common areas and not part of the rented rooms), particularly when plaintiff would purposely leave the water running. He felt that plaintiff was a "troublemaker" and, in addition to leaving the water running, plaintiff also broke the door, thermostat, central air system, used drugs and gambled in the apartment, generated noise, wielded a gun at him, put a hole in the wall, and called the police, which made him feel like a criminal. Liebowitz also spit on his son. When plaintiff ceased paying rent, Mr. Urteaga and his son discussed eviction and Dubon suggested that he get a court order to that effect. Mr. Urteaga specified that he and plaintiff had two or three altercations when plaintiff "came at him" and pushed him; one of which resulted in Mr. Urteaga telling him outside the house "[l]et's go around to the corner to see how we can go about it, to finish it because had me up to here [sic]." However, plaintiff would never follow him since he was a "chicken." On the evening of the incident, Mr. Urteaga was upstairs either watching television or sleeping, and his wife was on vacation in Israel. He learned of the fight, which took place across the street on the corner of the block, the following day. He then told his son to "lawyer up" because he believed plaintiff was an opportunist who would manipulate the incident to his financial advantage.

Dubon also testified herein. He has a room on the second floor of the premises, and visits approximately twice per week, usually to pick up clothing or sleep there. He was never

paid by his parents for doing any work at the premises; he did not perform any work thereat, including repairs or rent collection. He never held himself out as the owner of the premises nor a person plaintiff could approach if he had any complaints. His parents would tell him that plaintiff was harassing them, pushing his father, and threatening to take the house away from them. When he learned of same, he confronted plaintiff and asked him why he was picking on his elderly parents. He felt that he spoke with him in a nice way since – being that he always had a gang of 15 to 20 people at the house – he (as well as the Urteagas) was "petrified" of plaintiff. Plaintiff responded by threatening that the house and "everything you own" would be his. Dubon called the police once after Liebowitz spit in his face. Ultimately, he served a Notice to Vacate upon him as a favor to his mother, who requested that he do so. On the evening of the incident, Dubon, his girlfriend, his children, Yvette, and Bennett were returning from Manhattan to have dinner with Mr. Urteaga. Plaintiff pulled in behind Dubon's vehicle and, when Dubon exited, plaintiff grabbed his shirt and "sucker punched" him twice, rendering him semi-conscious, and he hit the ground. Bennett then came to Dubon's defense and struck plaintiff. Dubon was arrested two weeks later; however, the charges against him were dropped.

Mrs. Urteaga also testified in this case. She stated that she jointly owned the premises with her husband. Dubon only came to the premises to visit approximately once per week. She does not know who Bennett is. She was reluctant to have Dubon sleep at the premises since she did not want him to know the problems the Urteagas were having with plaintiff. Her and Mr. Urteaga rented out three rooms on the first floor of the premises. Mr. Urteaga was responsible for collecting rent and dealing with tenants. Plaintiff was a problem tenant: he would not pay rent, he pushed Mr. Urteaga and threatened him with a pistol, he used drugs, and he would not allow Mr. Urteaga to fix or adjust the air conditioning system. The Urteagas originally engaged a process server to serve plaintiff with the Notice to Vacate; however, he was too nervous so they asked Dubon to do it. Mrs. Urteaga was in Israel at the time of the incident and learned about same, when she returned, from one of her neighbors, who stated that plaintiff attacked her son outside near the corner of the block.

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; *Wineqrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [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 (*id.*). 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 a preliminary matter, plaintiff's counsel contends that the motion should not be considered as untimely, citing the fact that he was short-served with the motion, same having been served on February 9, 2016 by overnight delivery, received by February 11, 2016, and made returnable on February 16, 2016. He further states that, though the court appears to have administratively rescheduled the return date to February 23, 2016, "the amount of time given to plaintiff's office to respond in order to fit the motion in the Court's prescribed time line was woefully insufficient pursuant to the CPLR."

While the Urteagas chose a proper return date for their motion – as motions for summary judgment were to be made returnable not later than February 16, 2016 per stipulation so-ordered by Justice Martin E. Ritholtz dated November 12, 2015 – they short-served same (CPLR 2214 [b], 2103 [b] [6]). However, given the fact that plaintiff (1) served his opposition to the motion on April 8, 2016, and (2) addressed the motion on the merits, plaintiff was not prejudiced by the procedural irregularity and plaintiff waived his objection to same, respectively (*see Piquette v City of New York*, 4 AD3d 402 [2004]). As such, the motion will be considered on its merits.

Turning to the Urteagas' first argument on the motion, they state that plaintiff's third cause of action against them must be dismissed since neither Dubon nor Bennett were their employees or agents. Thus, they can neither be held vicariously liable for their actions, nor can they be charged with negligent supervision. They further state that, even if it were determined that Dubon and Bennett were employees/agents, the incident was not within the scope of employment.

"Under 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 Hoffman v Verizon Wireless, Inc.*, 125 AD3d 806 [2015]; *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 attach 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).

As far as Bennett is concerned, the Urteagas established, prima facie, that there was no direct agency or employment relationship between themselves and Bennett and, thus, they cannot be held vicariously liable for his actions (*see Entler v Koch*, 85 AD3d 1098 [2011]).

The testimony submitted on the motion reveals that they had no relationship with Bennett: Mr. Urteaga knew him to be a friend of Yvette's and Mrs. Urteaga did not know who he was. Moreover, plaintiff testified that he only met Bennett two to three weeks prior to the incident. There is no testimony to suggest Bennett's connection to the Urteagas for purposes of establishing an agency relationship. In opposition to the motion, plaintiff has failed to raise an issue of fact with respect to this issue; rather, it would appear that his focus is on Dubon's relationship with the Urteagas. Thus, plaintiff's third cause of action – only to the extent it alleges that the Urteagas are liable for Bennett's actions, may not be maintained.[1]

Turning to the relationship between Dubon and the Urteagas, while the Urteagas are correct in their assertion that the parent-child relationship, in and of itself, does not thereby render the Urteagas liable for their son's conduct (*see Kouril v SLS Residential, Inc.*, 87 AD3d 560 [2011]), vicarious liability may, nevertheless, attach if there exists some other agency relationship (*see generally Amendolace v City of New York*, 2 AD3d 659 [2003]; *Maurillo v Park Slope U-Haul*, 194 AD2d 142 [1993]; 14 NY Prac, New York Law of Torts § 9:4). Further, and in this context, "agency rules do not only apply to a parent-child relationship solely within a strictly business or employment context. It is well settled that members of a family may enter into a gratuitous agency relationship where there is no evidence of any payment incident to the agency relationship" (*Maurillo*, 194 AD2d at 147).

While the Urteagas and Dubon certainly testified that the latter did not collect rent, make repairs at the premises, receive compensation for work performed thereat, or could not have otherwise been considered an agent or employee, plaintiff testified that Dubon collected rent from other tenants at the premises, that he performed minor repairs, that he held himself out as the landlord, that he indicated that he was the person responsible for complaints, and that he served the eviction notice on plaintiff. As the court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683 [2009]; *see Santiago v Joyce*, 127 AD3d 954 [2015]), the Urteagas have failed to meet their prima facie burden of establishing, as a matter of law, the absence of an agency relationship between themselves and Dubon.

The Urteagas next argue that, even if it is established that an employment or agency relationship existed between them and Dubon, Dubon's actions were outside the scope of said employment or agency in that, *inter alia*: (1) there is no evidence that the Urteagas requested that Dubon use force to coerce plaintiff to leave the premises; (2) the Urteagas

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1. Though there was no evidence presented that there was a direct agency relationship between Bennett and the Urteagas, the latter may, nevertheless, ultimately be held responsible by virtue of their agency relationship with Dubon (and, according to plaintiff, his having acted in concert with Dubon), said relationship discussed *infra*.

were not aware that the incident was taking place; (3) the incident did not occur on the Urteagas' premises; (4) the Urteagas could not have reasonably anticipated that Dubon and plaintiff would become involved in an altercation as the Urteagas "were taking all legal methods to avoid [plaintiff] finding an opportunistic legal reason to sue them"; and (5) Dubon's actions were for his own personal motives (*i.e.*, self-defense, anger regarding plaintiff's actions toward him and his family).

On this record, it cannot be determined – as a matter of law – that Dubon's actions were exclusively for personal motives and, thus, the Urteagas are not entitled to summary judgment on this issue. It should first be stated that a determination as to whether an act – including an intentional tort – is within the scope of employment "is so heavily dependent on factual considerations that the question is ordinarily one for the jury," even when the precise act or manner of injury is not foreseeable so long as the conduct could have been reasonably expected (*Patterson v Khan*, 240 AD2d 644 [1997]; *see Riviello v Waldron*, 47 NY2d 297 [1979]). Here, it is for a jury to determine whether Dubon was acting for purely personal reasons or whether he was acting within the scope of an agency relationship with the Urteagas. For example, that Mr. Urteaga himself suggested that he and plaintiff were to have a confrontation "around to the corner to see how we can go about it, to finish it" may indicate that like conduct by Dubon could have been reasonably expected and, thus, in furtherance of the agency relationship (*see e.g. Ramos v Jake Realty Co.*, 21 AD3d 744 [2005] [employee's animus was shared by defendant employer and defendant's interest would have been furthered by virtue of employee's actions and, as a result there was an issue of fact as to whether employee's assault of the plaintiff was within the scope of employment]).

As far as plaintiff's claim under the theory of negligent supervision, such a claim requires that plaintiff establish that the Urteagas knew or should have known that Dubon had violent propensities or a propensity for the conduct which resulted in plaintiff's injury (*see DeJesus v DeJesus*, 132 AD3d 721 [2015]). There is an issue of fact in that regard sufficient to warrant denial of that branch of the motion, based upon plaintiff's claims of the Urteagas' and Dubon's intimidation tactics leading up to the altercation.

Turning to plaintiff's fourth cause of action, under New York law, to state a claim for IIED, a plaintiff must allege: (1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress (*see Howell v New York Post Co., Inc.*, 81 NY2d 115 [1993]; *Bernat v Williams*, 81 AD3d 679 [2011]).

The Urteagas have failed to meet their burden of establishing their entitlement to dismissal of this cause of action. The interruption or discontinuance of tenancy services, as

alleged by plaintiff, is sufficient to constitute extreme and outrageous conduct (*see Green v Fischbein, Olivieri, Rozenholc & Badillo*, 135 AD2d 415 [1987]), as is plaintiff's description of the events leading up to and including the altercation, which may constitute a "campaign of harassment or intimidation" (*see Nader v General Motors Corp.*, 25 NY2d 560 [1970]), particularly if they are found to be in furtherance of the agency relationship (*cf. Duane Thomas LLC v Wallin*, 8 AD3d 193 [2004]).

To the extent the Urteagas argue that plaintiff's alleged injuries predate the incident, the fact that plaintiff has asserted a prior psychological condition in connection with another lawsuit does not establish, prima facie, that any current complained-of conditions are not the result of the subject incident. The Urteagas have not submitted any medical evidence, in admissible form, that would otherwise suggest the absence of a causal connection between the conduct and the resulting injury.

Accordingly, that branch of the Urteagas' motion for an order granting them summary judgment dismissing the third cause of action is granted only to the extent that it relates to their direct responsibility for Bennett's alleged conduct. The motion is otherwise denied. Finally, to the extent the motion seeks dismissal of all cross-claims, same is denied inasmuch as they have not demonstrated that any cross-claims against them have been interposed.

Dated: May 17, 2016

J.S.C.