

Kwang Bok Yi v Open Karaoke Corp.

2016 NY Slip Op 33215(U)

October 7, 2016

Supreme Court, Westchester County

Docket Number: Index No. 51789/2014

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----x
KWANG BOK YI,

Plaintiff,

Index No. 51789/2014

-against-

DECISION & ORDER

OPEN KARAOKE CORP., NORAE HAHUN
JOB, CORP; 162 D&Y CORP., DONG HYUN HA,
and YONG AE HA,

Defendants.

-----x
The following papers numbered 1 to 6 were read on defendants' motion to dismiss the complaint.

PAPERS NUMBERED

Notice of Motion/Affidavits/Exhibits	<u>1-3</u>
Affidavit in Opposition/Exhibits	<u>4-5</u>
Reply Affirmation	<u>6</u>

Factual and Procedural Background

On February 6, 2014, plaintiff, appearing pro se, commenced this action seeking damages for personal injuries he sustained on February 7, 2011 as a result of an altercation with the employees of a karaoke bar located at 40-20 149th Place, Flushing, New York. Plaintiff asserts claims sounding in negligent hiring and a violation of his federal rights pursuant to 42 USC § 1983.

On February 7, 2011, at about 11 p.m. plaintiff was a patron at a karaoke bar with a friend Regain Lah. He left the bar and waited outside for Lah to leave as well. After about 10 minutes, when she did not come out he went back into the bar and saw Lah talking to Sam Kim. There appeared to be an issue with Lah not making a payment for bar services.

Plaintiff states that when Kim saw him he came out from behind the bar and started cursing at him. Then he and Lah proceeded to leave the bar. Prior to reaching his car outside, plaintiff alleges that he was assaulted by Kim. Defendant Dong appeared and called the police. Plaintiff was arrested.

Defendants Norae Hahun Job Corp. and Dong Hyun Ha ("the Dong Defendants") appeared and answered Norae and Dong owned the karaoke bar in question. Defendants Open Karaoke Corp., 162 D&Y Corp. and Yong Ae Ha did not file an appearance or answer (the "Open Karaoke Defendants").

By decision and order dated February 5, 2015, the Court (Connolly, J.) denied plaintiff's motion for a default judgment against all defendants and denied the Open Karaoke Defendant's motion for leave to file a late answer.

The Dong defendants now move for summary judgment dismissing the complaint and the Open Karaoke Defendants seek an order of the Court to sua sponte dismiss the action against them.

In support of their motion for summary judgment, the Dong Defendants argue that it was plaintiff who initiated the assault on Kim and that Kim did not strike plaintiff. In support of their motion, the Dong Defendants submit the deposition testimony of both Dong and Kim who each state that plaintiff punched Kim and that Kim did not strike plaintiff. The Dong Defendants argue that plaintiff's claim for negligent hiring and/or supervision must be dismissed because there is no evidence that they had any knowledge of assaultive behavior on the part of Kim. Dong states that when Kim was hired, they checked his references and allowed him one month of on the job training.

The Dong defendants also argue that they did not violate plaintiff's civil rights under 42 USC § 1983¹ since it was not acting under the color of the law. Further, they did nothing wrong when they called the police to stop the altercation.

¹ 24 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In opposition, plaintiff, appearing pro se, argues that Kim was improperly hired because he has a criminal background. Plaintiff also argues that the Dong Defendants violated his rights by filing a false police report. Plaintiff also submits the affidavit of Regina Lah who states that Kim physically attacked her and plaintiff and that Kim was not present when the police arrived. Plaintiff also alleges that there was a corrupt relationship between the karaoke bar and the police of the 109th precinct.

Discussion

At the outset the Court sua sponte DISMISSES the complaint against the Open Karaoke Defendants.

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training (see *Watson v. Strack*, 5 A.D.3d 1067; *Weinberg v. Guttman Breast & Diagnostic Inst.*, 254 A.D.2d 213).

However, an employer cannot be held vicariously liable for alleged assault where assault was not within scope of employee's duties, and there is no evidence that assault was condoned, instigated or authorized by employer (see *Yeboah v. Snapple, Inc.*, 286 A.D.2d 204 [2nd Dept 2001]).


Here, the Dong Defendants have established prima facie entitlement to summary judgment dismissing the complaint. Notably, the Dong Defendants argue that Kim did not attack plaintiff, but if he did, they had no knowledge of any propensity on Kim's part to do so. In opposition, plaintiff states, without evidentiary support, that Kim used illegal drugs and that he had a criminal record. However, these conclusory allegations are insufficient to raise an issue of fact precluding summary judgment in the Dong Defendant's favor on the issue of negligent hiring.

With respect to plaintiff's claim that the Dong Defendants violated his civil rights, here too he fails to raise an issue of fact. The essential elements of a § 1983 cause of action are conduct committed by a person acting under color of state law, which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C.A. § 1983. (See *Maio v. Kralik*, 70 A.D.3d 1 [2nd Dept 2009]).

While plaintiff alleges that the Dong Defendants and the police conspired to falsely arrest him and maliciously prosecute him, he provides no evidentiary support for these statements. Therefore, he has not shown how the Dong Defendants acted "under color of the law" to deprive him of his civil rights.

Based on the foregoing the Dong Defendants' motion for summary judgment dismissing the complaint is GRANTED.

Dated: White Plains, New York
October 7, 2016


HON. WILLIAM J. GIACOMO, J.S.C.

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