

Arroyo v Gonzalez

2018 NY Slip Op 33875(U)

July 16, 2018

Supreme Court, Bronx County

Docket Number: 22573/2015E

Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(E)

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Lydia Arroyo and Perfecto Arroyo,

Plaintiffs,

Index No. 22573/2015E

DECISION and ORDER

- against -

Johan Gonzalez and International Compare Food
International, a/k/a John Doe Inc.,

Defendants.

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Plaintiff Lydia Arroyo claims that on 4/13/14, Ms. Arroyo was shopping at defendant International Compare Food International ("International") store when she was struck in the face by a can thrown by defendant Gonzalez, a customer in the store. Defendants' negligence allegedly caused her to sustain serious injuries. Defendant International moves for summary judgment liability pursuant to CPLR 3211 dismissing plaintiffs' claims and all cross-claims asserted against it.

A party may move for judgment on the ground that the pleading fails to state a cause of action (CPLR 3211[a][7]). The Court's role in deciding such a motion is to determine whether the complaint states a valid cause of action on its face (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2007]). "If a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated" (Siegel, NY Prac §208 [5th ed]).

In support of its motion, defendant International proffers the deposition transcripts of plaintiffs Lydia and Perfecto Arroyo, Rafael Goris and Javier Polanco.

Plaintiff Lydia Arroyo testified that she shops for groceries at defendant International about two times a month. On the date of the accident, the assailant was walking directly in front of her as she walked into the supermarket. There is no vestibule or lobby to enter the supermarket, which uses sliding doors. Ms. Arroyo recalls that the person who entered the store in front of her and was wearing a beige trench coat¹. She remembers nothing beyond that moment. She only remembers grabbing for her glasses, not being able to find them and landing on the floor near the vegetables. She does not remember how she was injured. Ms. Arroyo testified that an unknown

¹This Court notes that the unknown assailant was wearing a blue baseball cap, a short-sleeve white shirt, a blue and orange sports jersey, orange pants and white sneakers.

woman² came over to assist her and sent someone in the store for ice for her eye.

Plaintiff Perfecto Arroyo testified at his deposition that when he arrived at the supermarket, his wife, plaintiff Lydia, was being escorted to the ambulance with the assistance of Ms. Cardona. Mr. Arroyo went back into the supermarket to see if the assailant was still in the store and the cashier told him that he was not. Mr. Arroyo stated that his wife was bleeding from the right eyebrow, her nose bore the indentation of a can and her eye was swollen and blood-red.

Rafael Goris, a manager at defendant International, testified that on 4/13/14, Javier Polanco was the only manager on duty. He states that the supermarket never had a need for security; the store had never been robbed and there were no violent incidents in the store prior to 4/13/14. According to Mr. Goris, incidents involving shoplifting are "very mild, minor" and the store has never called the police for a shoplifting incident nor prosecuted anyone for shoplifting.

Javier Polanco testified that he was the manager on duty on 4/13/14. He states that defendant International never employed security guards because it never had a problem in that store.

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Q. All right. Now, on the date of the incident, were you present when the incident actually occurred?

A. I was in the front.

Q. You were in the front. And what did you see with regards to the incident?

A. I saw when the guy and the girl were buying, and then some guy came from outside and started hitting the guy; so, then the guy who had been hit grabbed a can that was throwing - - throwing it to the other one and that's how the lady got hit in the eye. She was hit in the face over here (indicating).

Mr. Polanco states that he did not know defendant Johan Gonzalez or the assailant. After the incident, Mr. Polanco called the police officers; the police made a report and called an ambulance for plaintiff Arroyo. Mr. Polanco testified that he asked Ms. Arroyo if she was alright and asked her to sit down on a milk crate until the ambulance arrived.

In opposition to defendant International's motion, plaintiffs proffer the deposition

²Milta Vita Cardona is the name of the unknown woman who assisted Ms. Arroyo in the supermarket after the accident.

testimony of Mr. Goris and Mr. Polanco, an affidavit from Lawrence J. Fenelly and a DVD disc containing surveillance video of the incident.

Mr. Fenelly, a security consultant retained by plaintiff, asserts the following:

1. The security surveillance system wasn't being observed by anyone therefore it wasn't an effective deterrent.
2. No signage was in the store stating CCTV is actively recording patrons.
3. There were no policies, procedures or protocols in place to guide the front store manager.
4. The lack of a written clear and comprehensive policies and procedures is below any accepted standard of security practice for any retail store.
5. The manager did say they never called the police but rather had minor shoplifting problems which they never reported thereby creating a false sense of security by suppressing the crime statistics, and claiming a lack of foreseeability.
6. Communications for security emergency were non existent/deficient, including the call to the police and ambulances.
7. No training of the employees to deal with crime and incidences.

Mr. Fenelly attests that upon his inspection of the crime scene and the neighborhood, it was foreseeable that an assault would occur and that defendant International was contributorily negligent in the incident of 4/13/14 because an assault could have been thwarted if security measures were in force. Plaintiffs' attorney contends that the testimony about one manager on duty on Sunday and no security guards heightens the potential for the commission of a crime. While an attorney's affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment, an opposing attorney's assertions, unsupported by any factual proof whatsoever, have no probative value, and therefore, fail to raise a triable issue of fact (*Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324 [1st Dept 2004]; *Ramnarine v Memorial Center for Cancer and Allied Diseases*, 281 AD2d 218 [1st Dept 2001]).

In the video, defendant Johan Gonzalez is seen placing his items on the checkout belt at the cash register, located by the store entrance. The unknown assailant walks up behind him and starts pummeling him with punches to the back of his head. As defendant Gonzalez turns around, he grabs two of the food cans on the belt in an attempt to throw them at the assailant, who flees from the store. The video establishes that this incident was an unforeseeable act of violence. Mr. Polanco, the store manager, testified that although he observed the incident, he had no time to react or to detain the assailant. The store manager testified that he did not know defendant Gonzalez or his assailant. Defendant International had no previous incidents of violence or notice of criminal activity.

There is no malfeasance on the part of defendant International and it therefore cannot be held liable (*Horst v 725 Food Corp.*, 248 AD2d 184 [1st Dept 1998]). A landowner has the duty to control the conduct of persons present on his premises when he has the opportunity to control or is reasonably aware of the necessity of such control (*Lindskog v Southland Restaurant* 160 AD2d 842 [2nd Dept 1990]). Here, the landowner or defendant International had no such opportunity.

Based on the foregoing, the Court finds that defendant International Compare Food International met its burden in establishing that it was neither involved nor could it foresee the occurrence of plaintiff Linda Arroyo's injury. Defendant International's submitted evidence is sufficient to warrant the dismissal of plaintiff's complaint and all cross-claims and its motion to dismiss is accordingly granted.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: July 16, 2018

So ordered



Hon. Lizbeth González, J.S.C.