| **Powell v CD Broadway Food Corp.** |
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| 2019 NY Slip Op 30237(U) |
| January 29, 2019 |
| Supreme Court, New York County |
| Docket Number: 152512/16 |
| Judge: Sherry Klein Heitler |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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DAVID POWELL,

Plaintiff,

-against-

CD BROADWAY FOOD CORP., et al.,

Defendants.

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Index No. 152512/16
Motion Seq. 005

**DECISION & ORDER**

**SHERRY KLEIN HEITLER, J.S.C.**

Plaintiff alleges that on March 26, 2015 he was assaulted by an unidentified security guard (named in the complaint as John Doe) near the entrance to a grocery store known as "Associated Supermarket" located at 3871 Broadway (Broadway Store) in Manhattan. His March 23, 2016 complaint alleges four causes of action: two for negligence, one for negligent hiring and retention, and one for punitive damages.[1]

By order dated June 19, 2018 the court declared defendants CD Broadway Food Corp. and CD Broadway Food Corp. d/b/a Associated Supermarkets to be in default for failing to answer or otherwise respond to the complaint (NYSCEF Doc. 57). The remaining defendants,[2] apart from the unidentified security guard, now move for summary judgment on the grounds that they did not occupy, manage, control, or inspect the premises at issue and did not hire the security guard. Plaintiff's counsel contends that the motion should be denied because there is a need for further discovery regarding the relationship between Associated and the owner of the premises where the assault took place.

[1] Defendants' exhibit A.

[2] Associated Food Holdings Inc., Associated Food Stores, LLC, Associated Supermarket Group, LLC, and Associated Food Stores, Inc. (Associated or Defendants).

Annexed to Defendants' motion is an affidavit sworn to by Dennis Stickley, Vice President for Credit Operations at Associated. In relevant part, he avers that Associated is a wholesale grocer that allows supermarkets that are otherwise individually owned and operated to use its name. Each individual store owner hires its own employees, including security guards. According to Mr. Stickley, Associated had no ownership interest in the Broadway Store, did not operate or otherwise manage the Broadway Store, and did not have any employees at the Broadway Store (Stickley Affidavit ¶¶ 2, 5-7).

Mr. Stickley was deposed on June 4, 2018.[3] It is clear that he had a great deal of knowledge about the company. He described in detail the process by which a supermarket would become branded as Associated. First an individual approached Associated to open a store and Mr. Stickley would inspect the proposed store premises. If approved Associated would provide financing for the buildout of the store and the purchase of equipment (Stickley Deposition pp. 10-13). After the store opened, Associated sold produce and food products to the store through salespersons and helped the store create weekly sales advertisements. Mr. Stickley confirmed that Associated does not hire anyone to work for any of the individual stores, does not have any security protocols or procedures that it requires the operators of the individual stores to follow, and does not provide any training for security personnel (*id.* at 27-28). Mr. Stickley admittedly was not familiar with individual store practices, including those of the Broadway Store. For example, he could not recall who operated the Broadway Store on the date of the incident in question, although Defendants' counsel previously identified the name of the operator as "King Meat Corp." in an April 23, 2018 letter (exhibit J). He also did not know if Associated

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[3] Defendants' exhibit D.

had any records in its possession relating to the store and was unaware if the store was party to a supply agreement (*id.* at 22-24).

Thereafter Plaintiff served Defendants with a discovery demand for the information and documentation counsel sought from Mr. Stickley at his deposition, including any sales agreement between Associated and the Broadway Store, the identity of the sales representative who serviced the Broadway Store on the date in question, and any reports or inspections related to the Broadway Store.[4] Defendants' response was that it was not in possession of any contracts or inspection reports and that the salesperson who serviced the Broadway store during the time in question passed away in 2017. Annexed to Defendants' response is a supplemental affidavit from Mr. Stickley in which he avers that he personally conducted the search for documents pursuant to Plaintiff's request. In his affidavit he again identified the operator of the supermarket as "King Meat Corp.", which is not a party to this litigation.[5]

Plaintiff asserts that there are "sales" and "customer service" representatives who are better equipped to testify about Associated's interactions with and control over individual store owners. As one example, Mr. Stickley identified Ms. Zulema Wiscowitch, Associated's Vice President of Sales. Plaintiff contends that she would be "most familiar" with the "degree of dominion and control" Associated exercised over the various Associated-branded stores.

## DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to

[4] Plaintiff's exhibit A.

[5] Defendants' exhibit E.

establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

To establish a case of negligence, Plaintiff must show that Defendants owed a duty to the Plaintiff, a breach of that duty, and that the breach proximately caused the injury. Duty is generally predicated upon ownership, operation, use, or control. *Mitchell v Icolari*, 108 AD3d 600, 601 (2d Dept 2013). The Stickley affidavits and deposition testimony establish that Defendants' owed no duty to Plaintiff because they did not own or operate the Broadway Store and did not exercise any control over the Broadway Store's individual practices.

To sustain a cause of action for negligent hiring or retention, Plaintiff must show that Defendants knew or should have known that the security guard had a propensity for the type of conduct in question. *Sheila C. v Povich*, 11 AD3d 120, 129 (1st Dept 2004). Here, to the contrary, it is evident that Associated did not hire or employ the security guard and did not provide the Broadway Store with any guidance, instructions, or training with respect to its security protocols. Moreover, even if there was evidence that Associated was involved with the hiring process, there is certainly no evidence that Associated knew or should have known that the security guard, who has still not been identified, had a disposition for violence.

Pursuant to CPLR 3212(f), the trial court has discretion to deny a motion for summary judgment, or to order a continuance to permit affidavits to be obtained or disclosure to be had, if

"facts essential to justify opposition may exist but cannot then be stated." For the court to delay action on the motion, "the party seeking the delay must 'put forth some evidentiary basis to suggest that discovery might lead to relevant evidence.'" *Shectman v Wilson*, 68 AD3d 848, 850 (2d Dept 2009 (quoting *Trombetta v Cathone*, 59 AD3d 526, 527 [2d Dept 2009]). "The mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient." *Spatola v Gelco Corp.*, 5 AD3d 469, 470 (2d Dept 2004).

Toward this end Plaintiff seeks to depose Ms. Wiscowitch to show that Associated controlled the Broadway Store to such an extent that it can be deemed liable for the actions of the Broadway Store's employees. The court declines this request. Mr. Stickley was more than qualified to testify about Associated's general business practices. And while Ms. Wiscowitch may know more about the sales aspect of the business, Associated's sales is only tangentially related to the issue of control in this case and is not likely to lead to the production of any inculpatory evidence. Plaintiff's counsel also makes several references to Associated's website, circulars, and marketing slogans as evidence that Associated set standards for its stores as a condition of remaining part of the Associated family. Again, even if this were true, this would not exhibit the degree of control needed under New York law to impose liability on Associated for the actions of another company's security guard. Accordingly, Plaintiff's request for additional discovery pursuant to CPLR 3212(f) is denied.

Finally, New York law does not recognize a separate cause of action for punitive damages. *See Jean v Chinitz*, 163 AD3d 497, 498 (1st Dept 2018); *La Porta v Alacra, Inc.*, 142 AD3d 851, 853 (1st Dept 2016); *Ehrlich v Incorporated Vil. of Sea Cliff*, 95 AD3d 1068, 1070 (2d Dept 2012).

In light of all the foregoing, it is hereby

ORDERED that Defendants' motion is granted in its entirety; and it is further

ORDERED that all claims against Associated Food Holdings Inc., Associated Food Stores, LLC, Associated Supermarket Group, LLC, and Associated Food Stores, Inc. are severed and dismissed; and it is further

ORDERED that this case shall continue as against the remaining defendants.

The Clerk of the Court is directed to enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

**ENTER:**

**DATED:** 1.29.19

**SHERRY KLEIN HEITLER, J.S.C.**