Roman v Nikodemo Operating Corp. Trading as Floridian Diner
2019 NY Slip Op 31292(U)
March 11, 2019
Supreme Court, Kings County
Docket Number: 500250/2014
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

ERICA ROMAN, KELLI KING AND MARISSA MCCLUSKEY,

Plaintiffs,

against

NIKODEMO OPERATING CORP TRADING AS FLORIDIAN DINER, BOYER-FLORIDIAN, LLC, M&K REAL ESTATE ASSOCIATES, LLC, TASK FORCE SECURITY AND INVESTIGATIONS, INCORPORATED, "JOHN DOE" (A FICTITIOUS NAME FOR THE DINER SECURITY GUARD), "LARRY DOE" (A FICTITIOUS NAME FOR THE DINER MANAGER), "BASHER DOE" (A FICTITIOUS NAME FOR THE DINER WAITER), AND "JANE DOE" (A FICTITIOUS NAME FOR THE DINER WAITRESS),

Defendants.

Index Number **500250/2014**
SEQ # 005

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

	Papers Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

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Upon the foregoing papers, defendant Nikodemo Operating Corp Trading as Floridian Diner's ("Nikodemo") motion for summary judgment is decided as follows:

Plaintiffs bring this action against defendants for damages caused during an altercation at the Floridian Diner, a restaurant owned by Nikodemo. They assert claims for: (1) assault and battery and false imprisonment; (2) intentional infliction of emotional distress; (3) negligent hiring and retention; and (4) negligence.

Factual Background

According to plaintiffs' depositions, they went to the Floridian Diner on January 13, 2013. When they arrived, a security guard was positioned near the entrance and a restaurant employee was at the front desk. Plaintiffs joined another group of patrons and they ate together in a back dining area. That same back area contained yet another group of patrons. The two

groups exchanged hostile comments, then at least one person began to through objects, and a physical melee ensued. Restaurant waiters and the security guard were present in the back dining area. The security guard pushed plaintiff Roman into a chair and told her to remain in the chair. The altercation continued until restaurant employees intervened. After a period of time while plaintiffs contacted the police, the altercation continued in the front lobby. The police arrived and the alteration finally ended.

Abdel Aziz, the manager of the Floridian Diner on the date of the incident, corroborated plaintiffs' testimony that they and another group of patrons ate in a back area of the restaurant. He testified at his deposition that the restaurant has a contract with a security company to provide a guard on Saturday and Sunday mornings beginning at 2:00 a.m. When plaintiffs arrived at the restaurant, Mr. Aziz believed they were intoxicated, and told the security guard to watch them. When he heard glass breaking in the back area of the restaurant, Mr. Aziz told the cashier to call the police, and asked the security guard to stop the fight. The security guard told the two groups to leave the diner, but the fighting continued in the front lobby area of the diner. Mr. Aziz contends that he, the busboy, and the security guard attempted to stop the fighting. When the police arrived, the other group had already left the restaurant.

Steven Zaharakis, a principal member of Nikodemo, states in his affidavit that he entered into a verbal agreement with "Ralph" to provide a security guard on Saturdays and Sundays. He also describes a certain video clip he retained from the surveillance video. However, the court does not have the means to view the video, which would require uploading outside media into the court's computer system.

Analysis

The moving party on a motion for summary judgment bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Assault and Battery with False Imprisonment:

To sustain a cause of action for damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful conduct (*Marilyn S. v Independent Group Home Living Program, Inc.*, 73 AD3d 895, 897 [2d Dept 2010]). To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature (*Gutierrez v McGrath Mgt. Services, Inc.*, 152 AD3d 498, 500 [2d Dept 2017]). For false imprisonment, plaintiff must prove "(1) the defendant intended to confine, (2) the plaintiff was conscious of the alleged confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged" (*Gordon v May Dept. Stores Co.*, 254 AD2d 327, 327 [2d Dept 1998]).

According to plaintiffs' testimony, the security guard pushed only plaintiff Roman into a chair and kept her in the chair during the altercation. There is no evidence that defendant Nikodemo or anyone associated with the restaurant committed any assault, battery or imprisonment. Accordingly, these claims asserted by plaintiffs King and McCluskey are dismissed as against Nikodemo.

Nikodemo argues that it was not responsible for the acts of the security guard, who was not an employee of Nikodemo. A party who retains an independent contractor generally is not

liable for the independent contractor's negligent acts (*Bros. v New York State Elec. and Gas Corp.*, 11 NY3d 251, 257 [2008]). There are exceptions to this general rule. First, the retaining party may be liable if it exerted sufficient control over the independent contractor (*Ciaravino v Bulldog Nat. Logistics, LLC*, 146 AD3d 928, 930 [2d Dept 2017]). Mr. Aziz, the manager of the diner, told the security guard to watch the plaintiffs and the other patrons in the back room and directed the security guard to stop the fight. This control over the security guards actions makes the diner liable for the security guard's negligence. Furthermore, a second exception also applies here, which is that the owner of the premises has a nondelegable duty to keep its premises safe (*Pesante v Vertical Indus. Dev., Co.*, 142 AD3d 656, 657 [2d Dept 2016], *affd*, 29 NY3d 983 [2017]).

Turning to the merits of the claim, Nikodemo argues only that plaintiffs have not proven assault or battery because they have not shown Roman was in imminent apprehension of harmful conduct or that the security guard's conduct was offensive. The only account of the interaction between Roman and the security guard comes from plaintiffs' deposition testimony. Roman testified that she was pushed into a chair and told the security guard to get off of her. King testified that the security guard was trying to calm plaintiff down. Based on such little information, there is no basis upon which to dismiss either claim.

Nikodemo also argues that plaintiffs have not proven false imprisonment because they were free to move about the diner and the security guard's actions were privileged. However, this is based on clips of the surveillance video, which is not in evidence. In any event, plaintiffs' claim appears to be restricted to the time Roman was confined to a chair, and not other times when Roman may have been walking freely about the restaurant. While Nikodemo may have a

decent argument that the actions of its security guard were privileged, the only legal support it offers is the privilege bestowed upon police (*see Petrychenko v Solovey*, 99 AD3d 777 [2d Dept 2012]), but not necessarily private security. Accordingly, plaintiff Roman's claim for false imprisonment is not dismissed.

Intentional Infliction of Emotional Distress:

Plaintiffs concede that they do not have a claim for intentional inflection of emotional distress. Accordingly, this claim is dismissed as against Nikodemo.

Negligent Hiring or Retention:

In order to prove their negligent hiring or retention claim, plaintiffs must show that Nikodemo "knew or should have known of the employee's propensity for the conduct which caused the injury" (*Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 635 [2d Dept 2018]).

Plaintiffs testified at their depositions that they had been at the restaurant a number of times before without incident. In their opposition, plaintiffs largely ignore this claim and/or merge it with their negligence claim, discussed below. In any event, plaintiffs offer no evidence that Nikodemo was aware of any deficiency or previous improper conduct from its security. Accordingly, plaintiff's negligent hiring or retention claim is dismissed.

Negligence:

Landowners have a duty to act in a reasonable manner to prevent harm to those on their property, but an owner's duty to control the conduct of persons on its premises arises only when it has "the opportunity to control such persons and [is] reasonably aware of the need for such control" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]). The owner of a public establishment has

no duty to protect patrons against unforeseeable and unexpected assaults (*Cutrone v Monarch Holding Corp.*, 299 AD2d 388, 389 [2d Dept 2002]).

The testimony shows that, when plaintiffs arrived, restaurant staff believed them to be intoxicated. The security guard was positioned near plaintiffs and the other group of patrons. The altercation escalated over a period time, first with words, then objects were thrown, and then the group came into direct contact with each other. Furthermore, the altercation continued even after being stopped once. During this time, security and restaurant staff had sufficient time to intervene.

That said, plaintiffs are not without blame. Their own testimony shows their participation in escalating and continuing the altercation rather than diffusing the situation themselves or leaving. Whether they are the proximate cause of their own damages, or how much fault they bear, will be the province of the jury in this case (*Vuksanaj v Abbott*, 159 AD3d 1031, 1032 [2d Dept 2018]; *Federico v Defoe Corp.*, 138 AD3d 682, 684 [2d Dept 2016]).

Conclusion

For the foregoing reasons, defendant's motion is granted only to the extent that plaintiffs King and McClusky's claims for assault, battery and false imprisonment are dismissed as against Nikodemo, and plaintiffs' claim for negligent hiring or retention is dismissed as against Nikodemo. Plaintiffs' intentional infliction of emotional distress claims are dismissed as against all defendants.

This constitutes the decision and order of the court.

March 11, 2019
DATE

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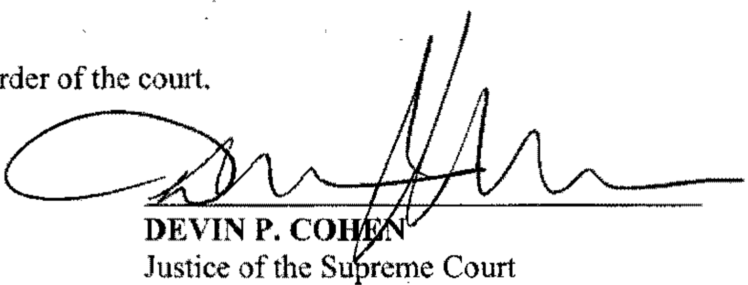

DEVIN P. COHEN
Justice of the Supreme Court