

Leahey v Setai Group LLC

2019 NY Slip Op 31381(U)

May 14, 2019

Supreme Court, New York County

Docket Number: 151298/2014

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

INDEX NO. 151298/2014

LAUREN LEAKEY,

MOTION DATE 05/09/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE SETAI GROUP LLC, JASON TURNER, AMERICAN LEISURE
MANAGEMENT OF NEW YORK CITY CORP, 40 BROAD SPA
OWNER LLC

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiff Lauren Leaky commenced this action after she was allegedly sexually assaulted by defendant Jason Turner during a massage at The Setai Spa on April 26, 2013. In her amended complaint, plaintiff asserts four causes of action: (1) negligence against all defendants; (2) negligent hiring and supervisions against defendant American Leisure Management of New York City, Corp., which operated and managed the spa, and defendant 40 Broad Spa Owner, LLC, the owner of the spa (the "Spa Defendants"); (3) breach of contract against the Spa Defendants; and (4) intentional infliction of emotional distress against all defendants. Defendants The Setai Group, LLC and Jason Turner have not answered the amended complaint and have not appeared in this action. The Spa Defendants now move pursuant to CPLR 3212 for summary judgment dismissing the amended complaint. Plaintiff opposes the motion and cross-moves for summary judgment on her claims. Plaintiff's cross-motion will be considered but plaintiff's reply papers in further support of her cross-motion, with the exception of the decision and order

plaintiff provided at oral argument from *Doe v. Pure Maximus Spa/Salon, et. al*, Index No. 19088/01 (Supreme Court, Nassau County), will not.

The Spa Defendants move to dismiss plaintiff's first cause of action seeking to hold them vicariously liable for defendant Turner's alleged sexual assault under the theory of *respondeat superior*. The Spa Defendants argue that they cannot be held vicariously liable for defendant Turner's actions because any alleged sexual misconduct by Turner while providing a massage to plaintiff was a clear departure from his duties as a massage therapist and therefore outside the scope of his employment. "An employer may be held vicariously liable for the tortious acts of its employee only if those acts were committed in furtherance of the employer's business and within the scope of employment." *N.X. v. Cabrini Medical Center*, 280 A.D.2d 34, 37 (1st Dep't 2001) (citing *Riviello v. Waldron*, 47 N.Y.2d 297 [1979]). However, "New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context." *Doe v. Alsaud*, 12 F. Supp. 3d 674, 677 (S.D.N.Y. 2014) (citing cases). Here, if plaintiff's allegations of sexual abuse are true, then defendant Turner "departed from his duties for solely personal motives unrelated to" defendants' business and thus his actions cannot be attributed to the Spa Defendants under the theory of *respondeat superior*. *RJC Realty Holding Corp. v. Republic Franklin Ins. Co.*, 2 N.Y.3d 158, 164 (2004).

In opposition, plaintiff argues that there is at least an issue of fact as to whether defendant Turner's actions were within the scope of his employment because it is "common knowledge that at some massage parlors sexual favors are performed by massage therapists." (Memorandum of Law Submitted by Plaintiff dated February 22, 2019, p. 4). However, plaintiff fails to offer any evidentiary support for this conclusory and speculative statement and thus it is insufficient to

create an issue of fact. Moreover, this assertion is contradicted by the Spa Defendants' policies, which expressly prohibit verbal or physical contact of a sexual nature. (Affirmation of Michelle Bochner dated January 2, 2019, Exh. K, at ¶ 4 and Exh. N).

Plaintiff also relies on an unpublished decision from the Supreme Court, Nassau County in which the court held that there was an issue of fact as to whether the masseuse was acting within the scope of his employment where he "inappropriately touched [plaintiff] in private areas numerous times." *Doe v. Pure Maximus Spa/Salon, et al.*, Index No. 19088/2001 (Supreme Court, Nassau County 2003), at 2. However, this decision, which is not binding on this court, lacks detail about the massage therapist's specific conduct, which may be factually distinguishable from the matter at hand, particularly since, unlike defendant Turner, the masseuse in the *Pure Maximus Spa* matter was not licensed and allegedly engaged in this conduct previously. *Id.* at 7. Therefore, his conduct, unlike defendant Turner's conduct, may have been reasonably foreseeable to the employer. *See generally Riviello v. Waldron*, 47 N.Y.2d 297, 303 (1979). Moreover, the decision in the *Pure Maximus Spa* case preceded the decision in *RJC Realty Holding* in which the Court of Appeals, in determining whether an insurance policy exclusion applied, held that the employer, which was also Pure Maximus Spa, could not be held liable for a sexual assault committed by one of its massage therapists. *RJC Realty Holding Corp.*, 2 N.Y.3d at 164. Thus, plaintiff's reliance on the *Pure Maximus Spa* decision is not persuasive.

In the second cause of action, plaintiff seeks to hold the Spa Defendants liable for their negligent hiring and supervision of defendant Turner. "A necessary element of a cause of action alleging negligent hiring or negligent supervision of an employee is that the "employer knew or should have known of the employee's propensity for the conduct which caused the injury." *KM v. Fencers Club, Inc.*, 164 A.D.3d 891, 893 (2d Dep't 2018). Defendants, in support of their

motion, submit the affidavit of Amanda Wells, who was the spa's director at the time of the alleged incident and was responsible for overseeing the hiring process and managing the spa's employees. (Bochner Aff., Exh. H at ¶ 4). Ms. Wells states she interviewed defendant Turner for the position and contacted two of his references before hiring him for the position. (*Id.* at ¶¶ 6-8). At the time of hiring, she was not aware of or on notice of any propensity by defendant Turner to engage in inappropriate sexual conduct or behavior which would require further inquiry. (*Id.*) Defendant Turner worked at the spa for approximately one year before the alleged incident and Ms. Wells never received any complaints from customers or other employees about his behavior. (*Id.* at ¶¶ 6, 9). The Spa Defendants also submit the affidavit of Manny Ramirez, who was the treatment manager at the spa at the time of the incident. Mr. Ramirez's affidavit essentially confirms the information in Ms. Wells' affidavit concerning the spa's hiring process for defendant Turner and further confirms that Mr. Ramirez was not aware or notified of defendant Turner's propensity to engage in inappropriate sexual conduct until the alleged incident occurred. (Bochner Aff., Exh. K at ¶ 10). Thus, the Spa Defendants have established their prima facie entitlement to judgment as a matter of law by demonstrating that they had no knowledge of any propensity by defendant Turner to commit sexual misconduct, either prior to or during his employment with defendants. See *Fencers Club*, 164 A.D. at 893; *Shor v. Touch-N-Go Farms, Inc.*, 89 A.D.3d 830, 831-32 (2d Dep't 2011); *Bouchard v. New York Archdiocese*, 719 F. Supp. 2d 255, 261-63 (S.D.N.Y. 2010).

In opposition, plaintiff relies primarily on the affidavit of Ben E. Benjamin, who states that he is an expert in the areas of hiring, training and supervision of massage therapists. (Affidavit of Ben E. Benjamin sworn to on February 22, 2019). As an initial matter, Mr. Benjamin's affidavit, which was executed in Massachusetts, lacks the requisite Certificate of

Conformity required by CPLR 2309(c). Moreover, the affidavit does not cite to any specific statutes or codes, but merely refers to conclusory industry standards without showing that these standards are binding on defendants. *Mauro v. Rosedale Enterprises*, 60 A.D.3d 401 (1st Dep't 2009). Further, Mr. Benjamin's conclusions regarding proximate cause are based on impermissible speculation and conjecture. For example, without providing any basis, Mr. Benjamin avers that the alleged sexual assault would not have occurred if plaintiff had been told she could wear underwear during the massage or there was a panic button in the room. (Benjamin Aff., ¶¶ 30, 53). Mr. Benjamin's opinions about the spa's hiring process are also unreliable. For example, Mr. Benjamin avers that the spa's interview and hiring process was superficial because the spa did not question defendant Turner about "boundaries, dual relationships, or sexual behavior." (Benjamin Aff., ¶ 41). However, Mr. Benjamin does not provide any basis for this claim or his knowledge of the specific questions which were asked of defendant Turner during his interview. Further, Mr. Benjamin's assertion that defendant Turner did not provide any professional references is directly contradicted by the employment application itself, which lists two references and by Ms. Well's affidavit, in which she states that, in accordance with the spa's policy, she contacted defendant Turner's references prior to hiring him. (Benjamin Aff., ¶ 36; Bochner Aff, Ex. H at ¶¶ 7-8).

Plaintiff, through the affidavit of Mr. Benjamin and elsewhere, also points to the fact that the Spa Defendants did not conduct a criminal background check on defendant Turner prior to hiring him. However, "there is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee." *Fencers Club*, 164 A.D.3d at 893. Here, there was no evidence that the Spa Defendants had knowledge of any facts that would have caused a

reasonably prudent person to conduct a criminal background check on defendant Turner.

Moreover, the plaintiff failed to come forward with any evidence that a criminal background check on defendant Turner would have revealed a propensity to commit sexual assault. *Id.*

Accordingly, the Spa defendants are entitled to dismissal of the second cause of action.

Likewise, plaintiff's third cause of action for breach of contract/warranty must also be dismissed as the agreement signed by plaintiff does not contain any express warranties regarding the safety of the spa or the screening or training of employees and there are no implied warranties applicable to this contract. (Bochner Aff., Exh. R); *Milau Associates, Inc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 486 (1977). Finally, plaintiff's fourth cause of action sounding in intentional infliction of emotional distress must be dismissed because, as discussed above, the Spa Defendants cannot be held vicariously liable for defendant Turner's action.

Accordingly, it is

ORDERED that the Spa Defendants' motion is granted and the cross-motion is denied; and it is further

ORDERED that the amended complaint is dismissed as against defendants American Leisure and 40 Broad Spa Owner with costs and disbursements to these defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

5/14/19
DATE


PAUL A. GOETZ, J.S.C.

1424
CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:
CHECK IF APPROPRIATE: