

Jordan v Dorn

2019 NY Slip Op 34740(U)

September 5, 2019

Supreme Court, Erie County

Docket Number: Index No. 800726/2016

Judge: Mark A. Montour

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STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

ANTHONY JORDAN,

Plaintiff,

Index No.: 800726/2016

vs.

DECISION AND ORDER

KIRK DORN,
STC ARCHITECTURAL PRODUCTS, LLC and
TMP TECHNOLOGIES, INC.,

Defendants

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Mark A. Montour, JSC

Background

On April 24, 2015, defendant Kirk Dorn, while a passenger in the back seat of a car, struck plaintiff, who was in the front seat of the car, multiple times causing serious injuries. Plaintiff brought this action on January 25, 2016.

Plaintiff, by notice of motion dated January 8, 2019, seeks an order granting summary judgement with a determination that defendant Dorn is liable for plaintiff's injuries and that plaintiff is free from any culpable conduct. Co-defendant STC Architectural Products, LLC (hereinafter "STC"), by notice of motion dated February 19, 2019, seeks an order granting summary judgement dismissing plaintiff's complaint, all cross claims, and punitive damage claims against it because defendant Dorn was not its employee or agent at the time of the incident. Co-defendant TMP Technologies, Inc. (hereinafter "TMP"), by notice of motion dated February 18, 2019, seeks an order granting summary judgement dismissing plaintiff's complaint, all cross claims, and punitive damages claims against it because defendant Dorn was not acting within the scope of his employment.

Oral arguments were heard on June 5, 2019, before this Court. The facts are set forth below from the parties' arguments and motion papers.

Prior to the events of April 24, 2015, defendant Dorn was the Vice President of Sales for TMP. TMP had entered into a business arrangement with STC to manufacture a new product that the owner of STC designed. The business arrangement included a number of additional services that TMP performed for STC, including joint responsibility "for continued development and marketing" of STC products. Under that arrangement, TMP helped to engage the plaintiff as an outside sales representative for STC's products. The agreement executed on November 17, 2014, by the plaintiff, defendant Dorn on behalf of TMP, and the President of STC, created an independent contractor relationship between the plaintiff and the two companies, TMP and STC.

Defendant Dorn and plaintiff planned to have dinner with their wives on the evening of April 24, 2015. Plaintiff understood this to be a business dinner to celebrate the first sale of the STC product to a customer in Texas and to celebrate that defendant Dorn would soon become an owner of TMP. Defendant Dorn's wife made dinner reservations for the group at Michael A's restaurant. She believed the event to be a social dinner. Plaintiff suggested that they meet at the

Buffalo Club, where he was a member, for drinks before dinner. Defendant Dorn testified that he had three dirty martinis at the Buffalo Club. After approximately an hour at the Buffalo Club, the parties left together in plaintiff's car for dinner, leaving defendant Dorn's car parked at the Buffalo Club. During dinner, defendant Dorn consumed nearly two bottles of wine. According to plaintiff's wife, defendant Dorn stated that "dinner was on TMP," and paid for dinner with a TMP credit card. According to defendant Dorn's wife, defendant was intoxicated by the time the group left the restaurant. Defendant Dorn testified that he has no memory of events past a certain point during dinner.

During dinner, defendant Dorn received a message from a friend asking him to meet the friend at another restaurant, Hutch's, for drinks. After dinner defendant Dorn suggested that the group go to Hutch's to meet his friend. The group traveled together to Hutch's in plaintiff's car. After arriving, defendant Dorn introduced his friend to plaintiff and plaintiff's wife. Defendant Dorn testified that he has known this friend since high school. There is no evidence that the friend is related to defendant Dorn's business activities or associated with TMP or STC. Plaintiff separated from the group to talk with some people that he knew and, upon returning, learned that defendant Dorn had gone outside with his friend. Plaintiff went outside and observed defendant Dorn and the friend pushing each other. When plaintiff told defendant Dorn "you can't do this," defendant pushed plaintiff, after which plaintiff went back inside and suggested to the wives that they leave. Defendant Dorn's wife tried to arrange a car service to take defendant Dorn and her home but it would be some time before the service would arrive, so plaintiff's wife offered to drive defendant Dorn and his wife home.

Defendant Dorn's wife went to defendant, took him by the arm, and walked him to plaintiff's car. Defendant Dorn was helped into the back seat of the car by his wife and plaintiff. Plaintiff sat in the front passenger seat, directly in front of defendant Dorn. Inside the car, defendant Dorn fell asleep or passed out. Approximately ten minutes into the drive, defendant Dorn woke up, wrapped his left arm around plaintiff's neck and began striking plaintiff with his right hand. Defendant Dorn's wife tried but was unable to restrain him. Plaintiff's wife pulled the car over and defendant Dorn's wife opened the rear door and pushed defendant out of the car. Defendant Dorn then started punching plaintiff through the opened window, at which point Plaintiff's wife started to drive away, with defendant's wife still in the back seat. After a short time, they turned around and took defendant's wife back to defendant Dorn.

Plaintiff suffered serious injuries as a result of the incident, including a permanent replacement tooth being knocked out, bleeding, and pain and bruising of the head and neck for which he sought treatment. Plaintiff reported the incident to the police the next day but did not immediately press charges. Defendant was ultimately arrested on July 14, 2015, and charged with assault under penal law §120.00 and harassment in the second degree under penal law §240.26(1). On October 21, 2015, defendant Dorn pled guilty to harassment in the second degree under Penal law §240.26(3).

Legal Analysis

a. Liability of Defendant Dorn

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 326, 501 NE2d 572, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 144 NE2d 387, 165 NYS2d 498 [1957].) Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad* at 853.) Once this showing has been made, however, 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. (*Zuckerman* at 562.)

It is undisputed that defendant Dorn, unprovoked, struck plaintiff multiple times inflicting injury upon the plaintiff. Testimony of the incident has been provided by plaintiff, plaintiff's wife, and defendant's wife, both wives having witnessed the attack. Defendant Dorn testified that he had no memory of the events of that night after some point at dinner. The evidence demonstrates that there is no dispute of fact about defendant Dorn's behavior. Therefore, as a matter of law, defendant Dorn is liable for the injuries caused by his unprovoked attack on plaintiff. Further, there is nothing in the record to establish a triable material issue of fact regarding plaintiff's culpable conduct because the record is clear that the attack upon plaintiff was unprovoked and unjustified.

b. Punitive Damages

Punitive damages are awarded in exceptional cases where the conduct displays "spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton". (*Marinaccio v. Town of Clarence*, 20 N.Y.3d 506, 511 [2013] (quoting *Dupree v Giugliano*, 20 NY3d 921, 924 [2012])). They are only available where the actions alleged constitute gross recklessness; or intentional, wanton, or malicious conduct; or are activated by evil or reprehensible motives. (*See, Sparks v Fels*, 137 A.D.3d 1623, 1623 [4th Dept. 2016]). The fact that defendant was intoxicated is not itself enough to warrant punitive damages. (*See, Trudeau v Cooke*, 769 N.Y.S.2d 322, 323 [3rd Dept. 2003]). A guilty plea to harassment in the second degree under Penal Law §240.26 is sufficient to raise a triable issue of fact. (*See, Hotaling v Carter* 137 A.D.3d 1661,1663 [4th Dept. 2016]).

The testimony shows that defendant Dorn was intoxicated at the time of the incident. He had drinks at the Buffalo Club and nearly two bottles of wine at dinner. He admits to blacking out at some time during dinner. Later, when leaving Hutch's, he had to be helped into the car and fell asleep shortly thereafter. Defendant testified that he has no memory of the attack that happened approximately ten minutes later. Plaintiff reported the incident to the police the following day. In July, defendant was arrested and charged. Defendant ultimately pled guilty to harassment in the second degree under Penal law §240.26(3).

Whether the plaintiff is entitled to punitive damages under these circumstances is a question of fact. The question needs to be resolved at a trial by a finder of fact. (*See, Schragel v. Juszczyk*, 43 A.D.3d 1375 [4th Dept. 2007] [holding that plaintiff raised an issue of fact whether an award of punitive damages is warranted by taking into account the nature of defendant's conduct and the level of his intoxication]; *see also, Gershman v. Ahmad*, 156 A.D.3d 868, 869 [2nd Dept. 2017] [holding that the intoxication of defendant may support an award for punitive damages where there is additional evidence that defendant engaged in wanton and reckless conduct evincing heedlessness and an utter disregard for the safety of others]).

c. Scope of Employment

The doctrine of *respondeat superior* holds employers vicariously liable for the tortious actions of their employees when acting in the scope of employment. (See, *Riviello v. Waldron*, 47 N.Y.2d 297, 302 [1979]). A central question to the doctrine is whether the employer is, or could be, exercising control over the employee's activity, either directly or indirectly. (See *Makoske v. Lombardy*, 47 A.D.2d 284, 287 [3d Dept. 1975], *aff'd* 39 NY2d 773). When there is a departure from the designated employment-related activity, consideration must be given to the foreseeability of the actions that arise from the departure to determine whether they place the employer at risk under *respondeat superior*. (See, *id.*; see also, *Riviello* 47 N.Y.2d at 304). An employer is not liable for an employee's action if the employee was "acting solely for personal motives unrelated to the furtherance of the employer's business." (*Mazzarella v. Syracuse Diocese*, 100 A.D.3d 1384, 1385 [2012]). Although the issue of whether an employee is acting within the scope of his or her employment generally is one of fact, it may be decided as a matter of law in a case in which the relevant facts are undisputed. (See, *Figura v. Frasier*, 144 AD3d 1586 [4th Dept. 2016]; *Carlson v. Porter*, 53 AD3d 1129 [4th Dept. 2008]; *lv denied* 11 NY3d 708 [2008]; see also, *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 327 [9th Cir. 1996]).

1. STC Architectural Products, LLC

STC had a contractual relationship with TMP to produce STC's products and other services. Under the agreement, both STC and TMP were jointly responsible for marketing the products. As the Vice President of Sales for TMP, defendant Dorn played a central role in the marketing functions for TMP, including bringing plaintiff on-board as an independent contractor to represent STC products. The evidence shows that TMP, as the manufacturer, would benefit from the sale of STC products and defendant Dorn's role in TMP was to help facilitate such sales. There was no evidence of any direct relationship between STC and defendant Dorn. Nor was there any evidence that defendant was empowered to act on behalf of STC. The sales agreement with plaintiff was executed by STC's President separately from TMP's execution, which was by defendant Dorn. Although plaintiff represents that one of the purposes of the dinner on the night of the incident was to celebrate the first sale of STC products, it was not directed by, approved by, or paid for by an agent or employee of STC, nor was the President of STC even aware of the dinner meeting. While there is no doubt that the relationship between STC and TMP is close, that

relationship does not establish that defendant Dorn was an employee or servant of STC. STC did not have the right to control defendant Dorn's work activities, either directly or indirectly. Therefore, as a matter of law, defendant Dorn was not an employee, agent, or servant of STC, and was not acting within the scope of employment for STC.

2. *TMP Technologies, Inc.*

Defendant was an employee of TMP at the time of the incident, more specifically, Vice President of Sales. In that role he helped to recruit plaintiff, executed a Sales & Marketing Agreement with plaintiff and STC, and maintained a business relationship with plaintiff on behalf of TMP. Plaintiff represents that they were having a business dinner on the night of the incident and that they had never been out socially. Viewing the evidence most favorably to the non-moving parties, the Court concludes that the dinner was in furtherance of the business relationship between plaintiff and TMP, notwithstanding that the reservations were made by defendant Dorn's wife, and that she accompanied defendant when she would not ordinarily be involved in a business dinner. The parties had a business relationship, the reasons for the dinner were to celebrate business accomplishments, business matters were discussed, and defendant paid for dinner with a TMP credit card after stating that dinner was "on TMP."

When the dinner was concluded, the parties decided to join defendant Dorn's friend at Hutch's. There is no evidence that the friend was associated with TMP or STC, or had any relation to defendant Dorn's business interests. The friend was someone known to defendant since high school and with whom defendant's wife was well acquainted but was not known to plaintiff or plaintiff's wife. At Hutch's, defendant Dorn introduced the friend to plaintiff and plaintiff's wife. Then, while defendant Dorn engaged with his friend, plaintiff separated from the group in order to engage with two of his friends that he discovered were also at Hutch's. No business was conducted or discussed. The sole reason for going to Hutch's was to meet-up with defendant Dorn's friend. This activity was not in furtherance of the business objectives but was a departure from designated activity of dinner for a solely personal motive. The relevant facts here are not in dispute, Therefore, as a matter of law, the business function of the evening ceased when the parties left the restaurant and the side trip to Hutch's was a purely personal, social activity.

Plaintiff argues that because defendant Dorn was an executive of the company that his own knowledge of his history of behavior while intoxicated is imputed to TMP. Plaintiff does not

suggest that a higher officer, or even another officer should have acted to intervene before the incident took place. The Restatement of Agency explains that “[a]n employer does not assume the role of insurer against all harm suffered by third parties with whom its employees may interact. Nor is it sufficient that an employer might have taken additional measures to control the employee, unless the employer was negligent in failing to take such measures.” Restatement [Third] of Agency, §7.07 (2006), comment a. The evidence shows that, while defendant Dorn was an executive at the time of the incident, he was not an owner of the company (the transaction in which he became an owner had not yet closed). Defendant Dorn had a supervisor who did not have knowledge of defendant’s history of behavior while under the influence of alcohol, nor did he have reason to know of such behavior. Therefore, TMP could not foresee that defendant Dorn would strike plaintiff during the personally motivated departure to Hutch’s, which was not in furtherance of the business objectives of TMP. There were no measures that defendant Dorn’s supervisor could have taken to prevent the incident from happening. Therefore, TMP could not be negligent for failing to take preventative measures.

Conclusion

Based on the foregoing, it is hereby:

ORDERED, ADJUDGED AND DECREED, that plaintiff’s motion for summary judgement with regard to the defendant Dorn’s liability is GRANTED; it is further

ORDERED, ADJUDGED AND DECREED, that plaintiff’s motion for summary judgment seeking to strike defendant Dorn’s affirmative defense alleging culpable conduct on the part of plaintiff is GRANTED; it is further

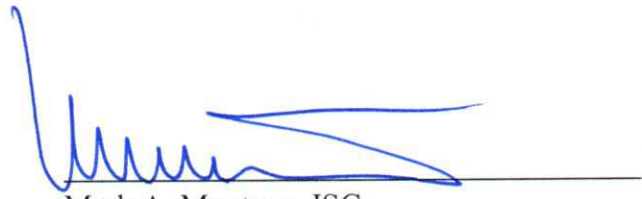
ORDERED, ADJUDGED AND DECREED, that this matter will proceed to a trial to determine whether punitive damages will be awarded to plaintiff; it is further

ORDERED, ADJUDGED AND DECREED, that co-defendant STC Architectural Product, LLC’s motion for summary judgement dismissing all claims, cross-claims, and punitive damage claims against it is GRANTED; and it is further

ORDERED, ADJUDGED AND DECREED, that co-defendant TMP Technologies Inc.'s motion for summary judgement dismissing all claims, cross-claims, and punitive damage claims against it is GRANTED.

Dated:

SEP 05 2019

A handwritten signature in blue ink, appearing to read 'Mark A. Montour', is written over a horizontal line.

Mark A. Montour, JSC