

Marrero v City of New York

2020 NY Slip Op 31510(U)

April 16, 2020

Supreme Court, Kings County

Docket Number: 518328/2016

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of April, 2020.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

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LUIS DIAZ MARRERO,
Plaintiff,

Index No. 518328/2016

- against -

DECISION AND ORDER

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF HOMELESS SERVICES,
COALITION FOR THE HOMELESS, INC.,
BUSHWICK ECONOMIC DEVELOPMENT CORP.,
d/b/a BEDCO, EDIE HARRIS RESIDENTIAL FACILITY,
HUGHETTE JASPER, and OASIS MOTEL

Motion Sequence #2, #3, #4
and #5

Defendants,

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

	<u>Papers Numbered</u>
Notice of Motion/Cross-Motion and Affidavits (Affirmations) Annexed	<u>1/2, 3/4, 5/6, 7/8</u>
Opposing Affidavits (Affirmations)	<u>9, 10, 11, 12</u>
Reply Affidavits (Affirmations)	<u>13, 14, 15</u>
Memorandum of Law	<u>16</u>

After a review of the papers and oral argument the Court finds as follows:

The Defendants, the City of New York (hereinafter referred to as the "City"), New York City Department of Homeless Services (hereinafter referred to as "DHS", Bushwick Economic Development Corporation d/b/a BEDCO (hereinafter referred to as "BEDCO"), Edie Harris Residential Facility (hereinafter referred to as "EHRF"), and Hughette Jasper (hereinafter referred to as "Jasper") (hereinafter collectively referred to as the "City Defendants") move (motion sequence #2) for summary judgment pursuant to CPLR 3212, and dismissal of the

Plaintiff, Luis Diaz Marrero's (hereinafter referred to as the "Plaintiff")'s complaint and all cross-claims against the City Defendants.

The Plaintiff cross-moves (motion sequence #3) for an order either (i) striking Defendant Coalition for the Homeless, Inc.'s (hereinafter referred to as the "Coalition") and the City Defendants' answers, pursuant to CPLR 3126, for their purported failure to comply with the Plaintiff's Notice of Discovery & Inspection, dated February 11, 2019; or (ii) in the alternative, an order compelling these Defendants to comply with the Plaintiff's Notice of Discovery & Inspection, pursuant to CPLR 3124.

Defendant Oasis Motel (hereinafter referred to as "Oasis") also moves (motion sequence #4) for summary judgment pursuant to CPLR 3212, and dismissal of the Plaintiff's complaint and all cross-claims as against Oasis.

Defendant Coalition also moves (motion sequence #5) for summary judgment pursuant to CPLR 3212, and dismissal of the Plaintiff's complaint and all cross-claims as against Coalition.

The Plaintiff, at the time of the occurrence a homeless shelter resident, alleges that he was intentionally injured by another shelter resident, Robert Diaz (hereinafter referred to as "Diaz"). At that time, December 25, 2015, the Plaintiff was sharing a residential unit with Diaz, within a shelter located at the Oasis Motel (hereinafter referred to as the "Oasis Shelter"). Specifically, the Plaintiff alleges that Diaz slashed his face with a blade, seriously injuring him. The Plaintiff claims that the Defendants (in their various capacities) were negligent and are responsible for his injuries. The Plaintiff argues that the Oasis Shelter was not a safe facility and was improperly operated.

The City Defendants argue that the Plaintiff's claim is not viable, because the slashing was not foreseeable. As such, the City Defendants contend that they are not liable to the Plaintiff. The City Defendants aver that for liability to be established the alleged assault had to be a probable outcome of the shared unit arrangement. They posit that the assault was not probable because, aside from a prior isolated incident, when Diaz allegedly exposed his genitalia to the Plaintiff (the "Flashing Incident"), the Plaintiff and Diaz had no prior incidents. The City Defendants contend that after the isolated incident, the Plaintiff and Diaz resided together for periods of time thereafter. Further, the City Defendants contend that the Plaintiff and Diaz resumed shared living space for approximately two weeks prior to the slashing. The City

Defendants also argue that the Plaintiff and Diaz shared food and liquor on the night of the slashing, contending that this constitutes additional proof of their harmonious relationship prior to the time of the slashing.

Further, the City Defendants argue that as the Plaintiff's claim relates to Jasper individually, Jasper cannot be held personally liable for the tortious acts of her principal, unless Jasper undertook an individual responsibility for her actions and took an affirmative action in furtherance of the tort. Jasper purportedly had no direct contact with the residents within the Oasis Shelter and did not conduct day to day activities at the Oasis Shelter. Consequently, the City Defendants argue that Jasper is not a proper defendant.

The Plaintiff, in opposition, argues that the City Defendants' motion should be denied because their argument is flawed. The Plaintiff contends that (i) the City Defendants were aware that the Plaintiff made prior complaints about Diaz after the Flashing Incident; (ii) the City Defendants promptly separated the Plaintiff and Diaz after the Flashing Incident and kept them separated for a period of three weeks because of that incident; (iii) when Diaz and the Plaintiff were thereafter placed in a shared living accommodation, the Plaintiff promptly gave notice to the City Defendants about the inappropriateness of that arrangement, in light of their history, and reported that he was uncomfortable with his new living placement.

Furthermore, the Plaintiff alleges that the City Defendants should have been more vigilant in protecting the Plaintiff because (a) immediately prior to the slashing, Diaz abused the Plaintiff, while the Plaintiff was asleep, by kissing him without permission; (b) the Plaintiff immediately reported this abuse to the City Defendants' security personnel at the Oasis Shelter's Security Station, who promised to (1) call the New York City Police Department and (2) detain Diaz at the Security Station until the Police arrived; and (c) the Plaintiff informed the City Defendants' security personnel that he was returning to his assigned room to sleep. The Plaintiff contends that notwithstanding the afore-referenced assurances, the City Defendants failed to detain or otherwise restrain Diaz from returning to the room to attack him.

Oasis claims that it should be awarded summary judgment since it was not involved in the incident. Oasis contends that it is merely the owner of the Oasis Motel and that DHS leased space within the Oasis Motel in order to accommodate the need for homeless housing. Oasis further contends that it did not maintain any operational control of the space that DHS leased

(the Oasis Shelter). Oasis argues that BEDCO operated and maintained the Oasis Shelter, at the time of the slashing. Oasis contends that BEDCO also agreed to indemnify Oasis from any liability that may have flow from BEDCO's use and operation of the Oasis Shelter at the Oasis Motel. Consequently, Oasis concludes that it has no duty to the Plaintiff and it cannot be liable to the Plaintiff, and the action and all cross-claims against it must be dismissed.

The Coalition contends that it is merely an advocacy group that (i) has no responsibility for the Oasis Motel or Shelter; (ii) did not operate, maintain, or control the Oasis Motel or Shelter; (iii) was under no obligation to secure the Oasis Motel or Shelter; and (iv) had no duty to the Plaintiff.

Generally, “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 A.D.3d 493 [2nd Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 [2nd Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Graham & Han Real Estate Brokers v. Oppenheimer*, 148 A.D.2d 493 [2nd Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept 2006]; see *Menzel v. Plotnick*, 202 A.D. 558, 558-559, 610 N.Y.S.2d 50 [2nd Dept 1994].

Generally, in premises liability matters, “[a] property owner has a duty to take reasonable measures to control the foreseeable conduct of third parties on his property to prevent them from intentionally harming or creating an unreasonable risk of harm to others...[t]his duty arises when there is an ability and opportunity to control such conduct, and an awareness of the need to do

so.” *Hillen v. Queens Long Island Medical Group, P.C.* 57 A.D.3d 946, 871 N.Y.S.2d 302 [2nd Dept 2008].

A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties... This includes the common-law duty to take “minimal precautions” to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person... To establish foreseeability, there is no requirement that the past experience of criminal activity to be of the same type as that to which the plaintiff was subjected, but the criminal conduct at issue must be shown to be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location... The duty to employ protective measures arises when it is shown that the possessor of the property ‘either knows or has reason to know from past experiences that there is a likelihood of conduct on the part of third persons ... which is likely to endanger the safety of the visitor.

Davis v. Commack Hotel, LLC, 174 A.D.3d 501, 501-502, 104 N.Y.S.3d 171, 173 [2nd Dept 2019].

Notwithstanding the above, generally, a defendant has no duty to control the conduct of third parties to prevent them from harming others. *Hegarty v. Tracy*, 125 A.D.3d 804, 4 N.Y.S.3d 254 [2nd Dept 2015]. However, when the defendant has special authority and ability to control the conduct of third persons, a duty arises. *D’Amico v. Christie*, 71 N.Y.2d 76, 85, 524 N.Y.S.2d 1 [1987]. This is determined on a *sui generis* basis. When there exists a special relationship between the defendant and a third party, whose actions expose the plaintiff to harm, that would require the defendant to protect the plaintiff from the third party’s conduct. See *Fox v. Marshall*, 88 A.D.3d 131, 136, 928 N.Y.S.2d 317, 321 [2nd Dept 2011].

Motion Sequence #5

In this matter, the Coalition alleges that it is not involved in or responsible for the conduct or operation of shelters. It contends that it maintains an oversight and monitoring role in

relation to whether the municipality is complying with its obligations to its homeless population. The Coalition contends that its oversight function requires it to visit and inspect city shelters generally in order to ascertain whether these facilities have requisite services and infrastructure. During this monitoring, the Coalition states that it may also communicate with shelter residents. The Coalition avers that it does not (i) arrange for the placement of residents at the Oasis Shelter, (ii) control where the residents of the Oasis Shelter are accommodated, or (iii) manage or operate the functioning of any shelter. As such, the Coalition argues that it cannot be held liable for a claim arising from the lack of control or unsafe operation of a shelter.

The Court finds that the Coalition has met its *prima facie* burden. It has established that it did not owe a duty to the Plaintiff. The Coalition has no control over the operation of the Oasis Shelter. There is no evidence that suggests that there is a triable issue of fact as to that issue. Therefore, this Court grants Coalition's motion for summary judgment (motion sequence #5).

Motion Sequence #4

Oasis also contends that it played no role in the management or operation of the Oasis Shelter. Oasis relies on Jasper's testimony to support this claim. Jasper noted that (i) DHS arranged for the utilization of the Oasis Motel as a homeless shelter; (ii) BEDCO was responsible for the operation of the shelter at the Oasis Motel; (iii) BEDCO was responsible for security at the Oasis Shelter; (iv) Oasis was not responsible for the security at the Oasis Shelter; and (v) Oasis was not notified that this slashing occurred (see Exhibit F, City Defendants' Affirmation in Support of its Notice of Motion, Examination Before Trial of Hughtette Jasper).

Oasis has met its *prima facie* burden relating to its liability to the Plaintiff. Oasis has established that although it owned the Oasis Motel at the time of the incident, it did not have control or oversight of the Oasis Shelter. Therefore, as an out-of-possession property owner, there was no duty for Oasis to protect the Plaintiff. See *Zaglas v. Gironda*, 266 A.D.2d 282, 698 N.Y.S.2d 49 [2nd Dept 1999] and *DeJesus v. New York City Health & Hosps. Corp.*, 309 A.D.2d 729, 765 N.Y.S.2d 377 [2nd Dept 2003]. Additionally, there is no special relationship between Oasis and the Plaintiff in order for this Court to impose a duty on Oasis to protect the Plaintiff

from Diaz. The Plaintiff has not proffered evidence to rebut Oasis' *prima facie* showing. Accordingly, Oasis' motion for summary judgment (motion sequence #4) is granted.

Motion Sequence #2

The City Defendants' argue that Jasper is not personally liable to the Plaintiff because she did not harm the Plaintiff and had no duty to him. The City Defendants contend that Jasper was BEDCO's Program Manager. By her own admission, she "run[s] the whole system" (see Exhibit F, City Defendant's Notice of Motion, Examination Before Trial of Hughtette Jasper, page 9). This includes, "oversee[ing] all the programs that go on there; caseworkers, security, IA monitors, food, cleanliness of the building, all reports that's due [*sic*] (Exhibit F at page 16). The Oasis Shelter was a location that Jasper oversaw on behalf of BEDCO. Jasper stated that she would visit the Oasis Shelter on a weekly basis during the period that BEDCO operated the Oasis Shelter (Exhibit F at pages 55-56). The City Defendants contend that during her visits, Jasper would receive any complaints that would have been made since her last visit and address these complaints by discussing them with the shift supervisor or case worker (see Exhibit F at pages 68-69). The City Defendants represent that if there were problems during the night time hours, Jasper would be notified directly (see Exhibit F at page 71).

Jasper acknowledged that a shelter resident exposing his genitalia to another resident was an inappropriate and violent act, and a breach of the rules governing accommodations within the Oasis Shelter (see Exhibit F at pages 71-74, 76). She indicated that if such a situation occurred and was reported, she should have been notified of same (see Exhibit F at page 74). Jasper stated that once informed of the situation she would interview both residents and likely separate the residents and end their shared living arrangements, permanently (see Exhibit F at page 75). Jasper confirmed that any type of sexual activity was not permitted in the Oasis Shelter (see Exhibit F at page 76). Jasper indicated that she was not aware of and had not dealt with the Plaintiff's complaint regarding Diaz allegedly exposing his genitalia to the Plaintiff (see Exhibit F at page 31). Jasper contends that she was only aware of the Plaintiff after the slashing, when she was notified that the slashing occurred.

“Where there is no evidence of independently tortious conduct on the part of [an] individual defendant [], and nothing in the record raises a triable dispute that [such defendant] acted at all times within the scope of [his or her] employment, [such an] individual [is] entitled to summary dismissal of the action.” *Mendez v. City of New York*, 259 A.D.2d 441, 442, 687 N.Y.S.2d 346, 347 [1st Dept 1999]; see also *Ali v. Pacheco*, 19 A.D.3d 439, 797 N.Y.S.2d 101 [2nd Dept 2005]. The Plaintiff has not alleged any specific action by Jasper that contributed to the slashing. Consequently, it appears that Jasper has satisfied her *prima facie* burden and there are no material issues of fact preventing an award of summary judgment to her. Accordingly, this Court grants the City Defendants’ motion for summary judgment (motion sequence #2) solely to the extent that the action is dismissed as against Defendant Hughette Jasper.

As to the remaining City Defendants, the Court must address whether the alleged slashing was reasonably foreseeable, in order to impose a duty on the City Defendants to have taken reasonable measures to protect the Plaintiff from Diaz. The Plaintiff contends that Diaz was a facility resident, under the control and direction of the facility’s operators, BEDCO. Except for Hughette Jaspe, as addressed above, the City Defendants have not distinguished the potential liability of each individual City Defendant. Jasper, during her testimony, noted that BEDCO had the authority to, and did take action to remove facility residents from their assigned accommodations in order to protect residents and/or ensure compliance with the rules for the accommodation of residents within the Oasis Shelter (See Exhibit E, City Defendants’ Motion, Examination Before Trial of Hughette Jasper, at page 22-23, 75, 78, 98).

The City Defendants contend that prior to the slashing, Jasper received no complaints about Diaz (See Exhibit E at page 115). The Plaintiff disagrees. The Plaintiff claims that the facility was notified that Diaz exposed himself to the Plaintiff and that the Plaintiff felt uncomfortable being placed in a shared living arrangement with Diaz (See Plaintiff’s Examination Before Trial at pages 32 and 55). Moreover, the City Defendants’ account of the night of the slashing materially contrasts with that of the Plaintiff. According to Jasper, when facility residents make a complaint there is a protocol that the shift supervisor must follow. This protocol, according to Jasper includes (i) informing Jasper about the complaint, (ii) making a written record of the complaint in a DHS Incident Form and an internal security form, and (iii) sending the documentation to Jasper and transmitting same to DHS (see Jasper’s Examination

Before Trial at pages 80-82). According to the DHS Incident Report of the night of the slashing, prepared by Jasper and Andre Nelson (hereinafter referred to as “Nelson”), that night’s Shift Supervisor, Nelson, found the Plaintiff and Diaz in their room, having a loud conversation at approximately 2:00 a.m. Nelson apparently noticed that both men were intoxicated. Nelson also purportedly observed Diaz threaten both the Plaintiff and Nelson. Nelson apparently called the police for assistance and Diaz spat on him. Nelson then left the room to summon additional security, and while Nelson was absent, Diaz slashed the Plaintiff (Exhibit 4, Plaintiff’s Cross-Motion).

However, the Plaintiff alleged that he returned to the Oasis Shelter after attending a party at a friend’s house, where he consumed alcohol. He gave Diaz some food and they shared an alcoholic drink. The Plaintiff represents that he then went to sleep and was roused from his sleep by Diaz kissing him. The Plaintiff represents that he pushed Diaz off of him, left the room, went to the Oasis Shelter’s security station and complained about Diaz to Nelson. The Plaintiff states that Nelson promised to (i) call the police, and (ii) separate the Plaintiff and Diaz by keeping Diaz at the security station until the police arrived. The Plaintiff contends that he informed Nelson that he was going back to his room to sleep. The Plaintiff alleges that when he returned to the room, Diaz was not there, and he proceeded to go to sleep. The Plaintiff alleges that he woke up to Diaz cutting his face (see Exhibit E, City Defendants’ Affirmation in Support of its Motion, Plaintiff’s Examination Before Trial at pgs. 57-58).

A motion for summary judgment, in a negligence action, will only succeed where, “there is no conflict at all in the evidence.” See *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501, 502, 104 N.Y.S.3d 171, 171 [2nd Dept 2019]. The conflicting versions of what occurred raises material issues of fact as to the foreseeability of Diaz’s actions and the propriety of the City Defendants’ actions. As such, the City Defendants have not met their *prima facie* burden. Consequently, the City Defendants’ motion for summary judgment (motion sequence #2) is denied except in relation to Jasper.

Motion Sequence #3

It is clear that an order striking a pleading, pursuant to CPLR 3126(3), "... is only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious" See *Rosenblatt v. Franklin Hops. Med. Ctr.*, 165 A.D.3d 862, 862, 85 N.Y.S.3d 488 [2nd Dept 2018] (internal quotations omitted). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures, or a failure to comply with court-ordered discovery over an extended period of time (see *Maliah-Dupass v. Dupass*, 166 A.D.3d 873, 875, 88 N.Y.S.3d 436, *Gutman v. Gutman*, 121 A.D.3d 1042, 1043, 995 N.Y.S.2d 180)." *Bouri v. Jackson*, 177 A.D.3d 947, 949, 113 N.Y.S.3d 232, 234-235 [2nd Dept 2019].

The Plaintiff's allegations do not detail conduct that can properly be considered willful and contumacious. However, the City Defendants must comply with reasonable discovery demands. The City Defendants have not alleged that the Plaintiff's requests are too onerous or excessive in order to excuse their compliance. Consequently, the Plaintiff's motion (motion sequence #3) for an order compelling compliance with the Plaintiff's Notice for Discovery & Inspection is granted.

It is hereby Ordered as follows:

The City Defendants' motion for summary judgment (motion sequence #2) is granted solely to the extent that the Complaint and all cross-claims as against Defendant Jasper are dismissed. The City Defendants' Motion is otherwise denied.

Defendant Oasis' motion for summary judgment (motion sequence #4) is granted and the Complaint and all cross-claims as against Defendant Oasis are dismissed.

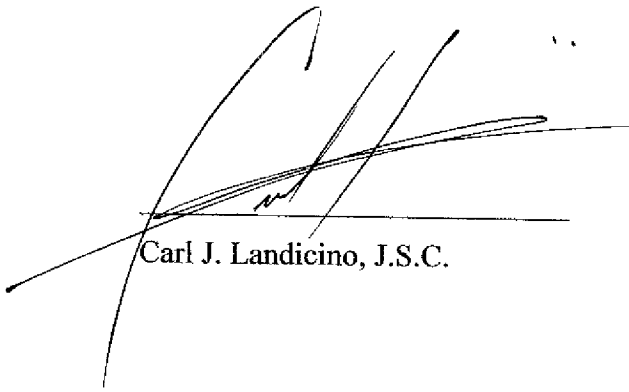
Defendant Coalition's motion for summary judgment (motion sequence #5) is granted and the Complaint and all cross-claims as against Defendant Coalition are dismissed.

The Plaintiff's motion (motion sequence #3) is granted solely to the extent that the remaining City Defendants are compelled to comply with the Plaintiff's Notice for Discovery & Inspection within 30 days service of a copy of this Decision and Order with notice of entry.

All other relief sought is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.