

Chunling Wang v Cambridge Sec. Servs. Corp.

2020 NY Slip Op 32568(U)

August 7, 2020

Supreme Court, New York County

Docket Number: 158874/2016

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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CHUNLING WANG,
Plaintiff,

- v -

INDEX NO. 158874/2016
MOTION DATE
MOTION SEQ. NO. 005 006 007

CAMBRIDGE SECURITY SERVICES CORP., THE
33 WEST END AVENUE CONDOMINIUM, 33
WEST END AVENUE ASSOCIATES, L.P.,
ATLANTIC DEVELOPMENT GROUP, LLC,
SENIOR LIVING OPTIONS, INC.,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 146-162, 198, 199, 202, 209-217, 220, 221

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 178-195, 203, 218, 219

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 163-177, 196, 197, 204

were read on this motion for summary judgment.

Defendant Cambridge Security Services Corp. (Cambridge) moves pursuant to CPLR 3212 for an order summarily dismissing plaintiff's complaint and all cross claims asserted against it. Plaintiff opposes. (Mot. seq. five).

Defendant 33 West End Avenue Associates, L.P. (33 West) moves pursuant to CPLR 3212 for an order summarily dismissing plaintiff's complaint and all cross claims asserted against it, and granting it summary judgment on its cross claims against Cambridge. Plaintiff opposes. (Mot. seq. six).

Defendants The 33 West End Ave. Condominium (condo), Atlantic Development Group, LLC (Atlantic), and Senior Living Options, Inc. (Senior) move pursuant to CPLR 3212 for an order summarily dismissing plaintiff's complaint and all cross claims asserted against them. Plaintiff opposes. (Mot. seq. seven).

I. BACKGROUND

In 2014, nonparty Met Council hired Cambridge to provide uniformed security services for a residential facility located at 315 West 61st Street in Manhattan, owned by 33 West. (NYSCEF 190).

At her deposition, plaintiff testified that on May 5, 2015 at 12:40 a.m., she arrived at 315 West 61st Street to see a client. A uniformed security guard let her in, she told him that she was going to apartment 15-O, and he directed her toward the elevator. As she walked toward the elevator, the security guard grabbed her hair, pushed her into a side room, locked the door, and assaulted her. Thereafter, he told her "if you don't call the police I'll let you go," and he released her. She left the building and called the police. (NYSCEF 152).

A Cambridge employee schedule reflects that nonparty Elliott Carter worked at the building from 4 p.m. to 12 p.m. on April 27 and 28, 2015, and then again, on May 4, 2015. (NYSCEF 158). It is undisputed that Carter was licensed to be an unarmed security guard at the time.

Carter was convicted of rape in the first degree as a result of the incident. At Carter's sentencing on September 16, 2016, the prosecutor stated that although Carter had no criminal record, the rape of plaintiff was not a "one-off," as just three days before, during his shift at another building where he worked as a security guard, he allegedly sexually assaulted another woman. Absent any report of that assault, Carter was not prosecuted, and the court did not

consider it in sentencing him. (NYSCEF 157).

At his deposition, Cambridge's vice president of operations testified that he was not aware of whether Cambridge provided security services for the building in issue. While he explained the process for hiring security guards in 2019, he did not know the company's procedure for hiring security guards in 2015, and knew nothing about Carter's employment. (NYSCEF 153).

At his deposition, Cambridge's account manager at the time of the incident testified that he was responsible for the building in issue and was there once a week, when he would check on the security guard and check the logbook. At the time of the incident, there was only one security guard shift from 4 p.m. to 12 a.m. Although he had been Carter's direct supervisor, the manager did not recall whether he had met him or received a complaint about him before the incident in issue, and he does not recall having interviewed him for employment with Cambridge. From February to the end of April 2014, the manager was also responsible for conducting employment interviews for Cambridge, and during that time, candidates would be required to fill out a standard job application, which requested employment history, home address, and educational background. He does not know when Carter was hired and whether the application for employment changed between February 2015 and May 2015. He never reviewed applications apart from when he interviewed prospective employees, and after April 2014, he was no longer responsible for hiring. Nor was he familiar with Cambridge's procedures for determining whether an applicant had a criminal history, although Cambridge security guards were given criminal background checks by New York State when seeking their security license. (NYSCEF 155).

At his deposition, the condo's former attorney testified that the building at which the

assault occurred is owned by Senior and leased to 33 West. 33 West converted the property into low-income senior housing pursuant to an agreement with New York City by which Met Council was entrusted with managing the property and ensuring that the property's units were being rented to the appropriate tenant population. Neither Senior nor condo were responsible for maintaining the premises, and Atlantic was solely involved in developing the premises; it did not own, lease, maintain, or operate it. (NYSCEF 170).

At her deposition, Met Council's resident director testified that she was responsible for maintaining the premises. Cambridge provided security guards for the building, and the only issues she had with the guards would be when they arrived late, fell asleep on the job, or did not open the door for a tenant who required assistance. Before May 5, 2015, she never received a complaint about a security guard, including Carter, engaging in inappropriate conduct toward tenants. Neither she nor anyone from Met Council were involved in hiring Cambridge security guards. (NYSCEF 154).

II. PLEADINGS

By summons and complaint dated October 20, 2016, plaintiff alleges that defendants are liable for negligent hiring, supervision, and retention of Carter. In addition, plaintiff alleges that defendants are vicariously liable for false imprisonment and negligent infliction of emotional distress. She seeks punitive damages. (NYSCEF 148).

In their answers, condo, Atlantic, Senior, and 33 West advance cross claims against Cambridge for contribution and indemnification. In its answer, Cambridge advances cross claims of contribution and indemnification against condo, Atlantic, and Senior. (NYSCEF 149). By stipulation dated January 23, 2020, condo, Atlantic, Senior and Cambridge discontinued their cross claims against each other. (NYSCEF 201).

III. PLAINTIFF'S CLAIMS

A. Contentions

1. Cambridge (NYSCEF 146-161)

Cambridge denies that it was negligent in hiring Carter, observing that he had never been arrested or convicted of a crime before this incident, that he was licensed as a security guard in this state, and that there were no prior complaints made against him. They also disclaim vicarious liability for false imprisonment and negligent infliction of emotional distress, as Carter's actions were outside the scope of his employment. Moreover, as Carter's actions were intentional, plaintiff's claim for negligent infliction of emotional distress fails. It denies that its alleged negligence warrants punitive damages.

2. 33 West (NYSCEF 178-194)

33 West contends that it cannot be held vicariously liable for Carter's actions, as he was Cambridge's employee, and 33 West had no role in or control over his hiring or training. In addition, it argues, Carter's actions were outside the scope of his employment.

3. Condo, Atlantic, and Senior (NYSCEF 163-196)

Condo, Atlantic, and Senior contend that they had no control over the premises where the incident occurred, and thus, may not be held liable for a dangerous condition on the premises, and that neither condo nor Senior retained control over the premises and they had no right to participate in negotiations between 33 West and vendors. They also maintain that as the development company for the property, Atlantic was not involved in the daily operations of the property. Absent a relationship with Carter, and as he acted outside the scope of his employment, they contend that they cannot be held liable for negligent hiring, false imprisonment, or negligent infliction of emotional distress, and deny plaintiff's entitlement to punitive damages.

4. Plaintiff (NYSCEF 209-217)

Plaintiff contends that Cambridge fails to demonstrate that it complied with GBL §§ 89-G(2) and (3)(b). She observes that Cambridge's vice president of operations testified that Cambridge only verifies licenses and that its account manager was unaware of the entire of the application process and never saw Carter's application. Moreover, Carter was alleged to have committed a similar act a few days before. In any event, she argues that the lack of a criminal record does not excuse Cambridge from conducting further investigations. Thus, under its contract with the condo defendants, Cambridge effectively launched a force or instrument of harm by having hired and failed to supervise Carter.

In light of the duty of Condo, Senior, and Atlantic to maintain the premises in a safe condition, and having failed to do so, plaintiff argues that they were negligent in failing to observe that Carter would remain on the premises after his shifts ended and would have to be asked to leave. She offers in support the transcript of an interview of Carter conducted by the district attorney's office on the day of his arrest, in which he states, among other things, that he had remained in the building past his shift that morning to wait for his MetroCard to renew. (NYSCEF 212). She denies that the condo defendants lack such control that would preclude them from being held liable.

As Carter was found guilty of "unlawful imprisonment," plaintiff contends, and in light of her severe psychological injuries due to the assault, her claims for false imprisonment should not be dismissed. And, as she denies claiming that defendants acted intentionally, her claim for negligent infliction of emotional distress should not be dismissed.

5. Cambridge's reply (NYSCEF 220)

Cambridge argues that statements made at Carter's sentencing are inadmissible hearsay

which may not be used to raise an issue of fact. Moreover, the claims made at the sentencing were neither considered as evidence of a prior assault nor relied on by the court in sentencing Carter, and there is no way that Cambridge could have learned of the alleged incident, which had occurred only three days before and for which he was not even arrested. It reiterates that Carter had no criminal history nor was there reason to believe that he had a propensity to commit the alleged act. It maintains that it complied with General Business Law § 89-g(1) by verifying with the Department of State that Carter had a valid registration card, and that section 89-g(3) does not apply because Carter had never been arrested or convicted before he was hired. Moreover, even if it had failed to comply with that provision, such a failure was not a proximate cause of plaintiff's alleged injuries.

Cambridge also contends that it is unclear whether Carter regularly remained in the building after his shift ended, and that even if he did, there is no duty to review surveillance video regularly, and defendants cannot be held liable for Carter's unforeseeable acts. It denies that plaintiff is a third-party beneficiary of or related to its agreement with Met Council.

6. 33 West's reply (NYSCEF 218)

33 West contends that it properly maintained the premises, and had no notice that Carter, an independent contractor, would commit a crime. It denies that evidence exists that Carter would remain in the building after his shift or that it had a duty to look at the surveillance video, and it denies having hired or supervised Carter or that it received complaints about him.

B. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-

26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

1. Negligent hiring, supervision, and retention

An employer is liable for negligence if it hired or retained an employee that it knew, or should have known, has a propensity to commit the acts which caused the plaintiff’s injury. (*Sandra M. v St. Luke’s Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006]). As it is undisputed that Carter was employed solely by Cambridge, only it may be held liable for negligent hiring, supervision, and retention. (*See Barnes-Joseph v Smith*, 73 AD3d 494, 495 [1st Dept 2010] [defendant not liable where it did not employ alleged tortfeasor]).

There are no specific hiring procedures an employer must follow. (*Shor v Touch-N-Go Farms, Inc.*, 89 AD3d 830, 831 [2d Dept 2011]). Rather, an employer need only demonstrate that it neither knew nor should have known of an employee’s violent propensities. (*See Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept 2001]).

The evidence demonstrates that Carter was a duly licensed security guard, that Cambridge had received no complaints about him, and that Cambridge was not required to conduct a criminal background check on Carter (*id.*). Even if it had conducted a check, it is undisputed that Carter had no criminal record, and thus, his actions were unforeseeable. Even assuming that Cambridge had a duty to monitor the surveillance tapes and thereby discovered

that Carter was remaining in the building after the end of his shift, such behavior does not suggest a propensity to commit an assault. (*Cf McCann v Varrick Grp. LLC*, 84 AD3d 591, 591–592 [1st Dept 2011] [security guard’s prior conviction for accessory to kidnapping had no relation to propensity to assault plaintiff]).

For these reasons, Cambridge had no reason to believe that Carter had a propensity to commit an assault, and it thus demonstrates, *prima facie*, that it did not negligently hire and retain Carter.

While General Business Law § 89-g requires security guard companies to conduct “due diligence” in verifying that the information contained in an application for a registration card it files with the department is true when hiring security guards, Cambridge’s alleged failure to do so is immaterial, as that failure was not a proximate cause of plaintiff’s injuries. (*See McLaughlan v BR Guest, Inc.*, 149 AD3d 519, 521 [1st Dept 2017] [granting summary judgment despite failure to comply with GBL § 89-g, as assault could have been committed in same manner if defendant was in compliance with statute]).

To the extent that plaintiff relies on Carter’s alleged commission of a similar assault a few days before the one at issue here, she fails to offer evidence of it beyond what was said at his sentencing. In any event, plaintiff offers no evidence demonstrating that Cambridge knew or should have known of that unreported incident.

Consequently, plaintiff does not raise an issue of fact that Cambridge was negligent.

2. Vicarious liability

An employer is “vicariously liable for torts committed by an employee acting within the scope of the employment.” (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]). However, vicarious liability may not be imposed where the employee acted outside the scope of

employment. (*Maloney v Rodriguez*, 156 AD3d 1404, 1405 [4th Dept 2017]). Carter’s actions are indisputably outside the scope of his employment as a security guard, and thus, Cambridge may not be held vicariously liable for false imprisonment or negligent infliction of emotional distress. Moreover, Carter was not employed by the other defendants, and thus, they too cannot be held vicariously liable.

IV. 33 WEST’S CROSS CLAIMS

As plaintiff’s claims against 33 West are dismissed, its cross claims against Cambridge for indemnification and contribution are likewise dismissed.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ motions for summary judgment are granted to the extent that plaintiff’s claims are dismissed and all cross claims are dismissed, and the Clerk is directed to enter judgment accordingly.

8/7/2020
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE