

**Summors v Port Auth. of N.Y. & N.J.**

2020 NY Slip Op 32599(U)

August 11, 2020

Supreme Court, New York County

Docket Number: 156744/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART IV

-----X  
KIESHA SUMMORS,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW  
JERSEY, AMERICAN AIRLINES, and "JOHN DOE"  
assailant, identity known to THE PORT  
AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendants.  
-----X

FRANK P. NERVO, J.S.C.:

DECISION AND ORDER

Index Number

156744/2017

Defendants move for summary judgment in their favor, dismissing the action against them, pursuant to CPLR § 3212, contending defendants have breached no duty owed to plaintiff and plaintiff cannot establish a prima facie case. Plaintiff opposes, contending defendants have failed to submit, in admissible form, evidence establishing they owed her no duty or are otherwise not responsible for the acts alleged. Plaintiff further contends she has established a prima facie case.

This matter stems from an alleged assault in a bathroom at John F. Kennedy International Airport, Hangar 10 (hereinafter JFK or Hangar 10). Plaintiff was employed to, inter alia, clean the bathrooms at Hangar 10. She alleges that while cleaning the men's bathroom, she encountered an employee wearing an American Airlines I.D., later identified as Billy Miles, who attempted to use the bathroom despite her informing him that the bathroom was closed for cleaning (Exhibit E- Plaintiff's

deposition at 42-49, 88). Mr. Miles left the bathroom area, but returned shortly thereafter, while the bathroom was still closed for cleaning, and forced his way into the bathroom (*id.* at 60-71). Plaintiff contends that she was repeatedly shoved in the chest by Mr. Miles, causing her to nearly fall, and the Port Authority Police responded after plaintiff reported being assault (*id.* at 84). Contemporaneously with the arrival of police, or shortly thereafter, an American Airlines manager, Anthony Gallo, responded to the scene (*id.* at 77-78, 85). Plaintiff contends the manager was “a little” concerned regarding the incident (*id.* at 87). Finally, she alleges that she had informed her employer that she experienced difficulty cleaning the men’s bathroom at Hangar 10 because American Airlines employees routinely used the bathroom while it was closed for cleaning however, she was still required to clean the bathroom (*id.* at 193-194). Plaintiff seeks to hold the defendants responsible under theories of vicarious liability/respondent superior and premises liability.

Mr. Miles alleges that he was not working at the time of the incident but was present in Hangar 10 to use the bathroom before flying to Detroit, as he had slept in his car the night before (Exhibit F – Billy Miles Deposition at 15-16). He does not dispute that he was told by plaintiff that the bathroom was closed and attempted to use it anyways because he felt plaintiff had an attitude during their interaction (*id.* at 54-56). Mr. Miles contends that any contact with plaintiff was minimal, characterizing the contact as “brushing” past her as she attempted to block the bathroom entrance, but that he could not recall if any contact actually occurred (*id.* at 59). He further contends that plaintiff grabbed him by the collar to eject him from the bathroom, and upon his placing his hands up to “break her contact with [him],” plaintiff began “swinging” and

struck him (*id.* at 64-65). Mr. Miles contends that the bathroom was not closed at the time he used it rather, he considered the caution sign to mean it was open with wet floors (*id.* at 71-73).

### **Summary Judgment**

American Airlines and The Port Authority of New York and New Jersey (hereinafter Port Authority) contend that plaintiff has failed to establish a prima facie case and that they cannot be liable for Mr. Miles actions because he was not “on-the-clock” at the time of the incident, was not acting within the scope of his employment, and they were unaware of any propensity for violence he may have. The Port Authority further argues that it cannot be held responsible on the basis of premises liability because it had no notice that Mr. Miles posed a threat and holding a property owner cannot be liable for the actions of a third-party based solely upon ownership or control.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader*,

*Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

### **I. Vicarious Liability**

An employer is liable for the intentional torts, including assault, committed by an employee when the employee acts within the scope of the employment at the time the tort is committed (*Ramos v. Jake Realty Co.*, 21 AD3d 744 [1st Dept 2005]). This scope of employment includes acts which are reasonably incidental or attributable to the act directed by the employer (*Riviello v. Waldron*, 47 NY2d 297 [1979]). Stated differently, an employer is no less liable because the employer has not specifically directed the employee's negligent or wrong action, if the employee has taken an action reasonably related to the employee's employment (*Jones v. Weigrand*, 134 App Div 644 [2d Dept 1909]). An employer is liable for the employee's act done in the scope of his or her employment, no matter how irregularly (*id.*). Thus, the issue becomes one tied to foreseeability – whether the employee's "general type of conduct may have been reasonably expected" by the employer, although the precise act or manner of injury need not be foreseeable (*O'Boyle v. Avis Rent-A-Car*, 78 AD2d 431 [2d Dept 1981]). Such inquiry is inherently fact specific and therefore, generally, the scope of employment is a question left to the jury (*Riviello v. Waldron*, 47 NY2d at 303]; see also *Ramos v. Jake Realty Co.*, 21 AD3d at 746).

Here, the evidence submitted by movants does not warrant summary judgment in their favor. As an initial matter, although the affidavit of Anthony Gallo is purportedly made upon personal knowledge, he was not present at the time of the alleged incident and his affidavit includes statements beyond the personal knowledge of an American Airlines Manager, *e.g.* whether the Port Authority directed Mr. Miles activities on the day of the incident, and Port Authority internal knowledge and procedures. Affidavits made without personal knowledge do not establish a movant's prima facie burden on summary judgment (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]; *Vermette v. Kenworth Truck Co.*, 68 NY2d 714 [1986]). As such, the Court will not consider the affidavit of Mr. Gallo. Alternatively, if the Court were to consider Mr. Gallo's affidavit, the Court finds it entirely conclusory, specifically tailored to the elements of vicarious liability, and unable to resolve factual questions precluding summary judgment (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Of note, the statement in Mr. Gallo's affidavit that "Mr. Miles was also trained that assaults, especially upon women are not allowed and are not part of the duties and responsibilities of his employment" belies belief in the absence of training materials/programs/certificates/procedures, and this Court is not bound to accept such incredulity.

Mr. Miles deposition does not dispute that he was present at the time of the incident, that he was told the bathroom was closed, that he used the bathroom despite being told it was closed, or that he may have physically contacted plaintiff – although he disputes shoving her. He claims that he was not working at the time of the incident,

however plaintiff testified that he was wearing an American Airlines I.D. badge and that American Airlines staff routinely used the bathrooms at Hangar 10.

Movants contend that Mr. Miles was “off-duty” at the time of the alleged incident, yet offer no timesheet or similar records for Mr. Miles. Likewise, movants contend that Mr. Miles was not acting within the scope of his employment, but do not provide his job duties or the duties of someone employed in his position. A conclusory self-serving affidavit by American Airline’s employee is insufficient to establish Mr. Miles was not on-duty or acting within the scope of his employment at the time of the alleged incident (*see e.g. Ramos v. Jake Realty Co.*, 21 AD3d at 746). Consequently, issues of fact remain whether Mr. Miles was on duty at the time of the alleged incident and the scope of Mr. Miles employment. American Airlines cannot be afforded summary judgment on plaintiff’s claims of vicarious liability on that basis.

Turning to plaintiff’s claims of vicarious liability against the Port Authority, Mr. Gallo’s affidavit is made without personal knowledge of the Port Authority’s records or policies, as he is a manager at American Airlines. Thus, the remaining evidence that Mr. Miles is not an agent of the Port Authority comprises his examination before trial.

The Port Authority, as movant, bears the burden of establishing it is entitled to judgment on the issue of vicarious liability and the absence the absence of any material issues of fact. It has failed to do so. Notably absent from this motion are Port Authority employment records, affidavits following a search of the Port Authority’s list of employees, affidavits from Port Authority employees regarding internal procedures

related to airline staff and access to its facilities, or similar. Mr. Miles testimony, standing alone, is insufficient, for the purposes of summary judgment, to establish the Port Authority's entitlement as a matter of law (*Ramos v. Jake Realty Co.*, 21 AD3d at 746).

## **II. Premises Liability**

The Port Authority erroneously contends that the instant matter is not predicated upon any theory of premises liability, and as such the action against it must fail because they are not vicariously liable for the actions of Mr. Miles. Plaintiff's complaint alleges, inter alia, the Port Authority failed to keep the premises safe, failed to investigate complaints of violence, and failed to remedy the conditions leading to the alleged assault (Complaint at ¶ 16). Thus, plaintiff has alleged liability on the part of the Port Authority based upon its ownership and control of JFK and Hangar 10.

To the extent that the Port Authority contends plaintiff has failed to make out a prima facie case, it conflates the burden on a summary judgment motion. As the movant, it is the Port Authority's burden to establish the absence of any issue of material fact. Here, the Port Authority has submitted no documentary evidence in support of its motion, other than the affidavit of Mr. Gallo, an American Airlines employee. As stated previously, Mr. Gallo – as an American Airlines manager – does not have the personal knowledge necessary to establish the procedures, responsibilities, and knowledge of the Port Authority for the purposes of a summary judgment motion. The Port Authority has not refuted, with admissible evidence, plaintiff's claims that it was aware of similar assaults or dangerous conditions in Hangar 10. In the absence of any other evidence on

this issue, the Port Authority has not made a prima facie showing it is entitled to judgment as a matter of law and, consequently, has not met its burden on this motion.

Accordingly, it is

ORDERED that the motion is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated August 11, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.