Sandoval v Leake & Watts Servs., Inc.
2020 NY Slip Op 34392(U)
July 8, 2020
Supreme Court, Bronx County
Docket Number: 303187/2013
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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EDUARDO SANDOVAL, an Incapacitated Person by His Co-Guardians, MAYRA SANDOVAL, and ALFREDO SANDOVAL,

Plaintiffs,

-against-

LEAKE AND WATTS SERVICES, INC., WENDELL CHAVIES, ASIALONE A. EDWARDS, and JOHN and JANE DOES, Personnel as yet unidentified,

Defendants.
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Index No. 303187/2013
Motion Calendar No. 13/14
Motion Date: 4/22/19

SECOND
AMENDED ORIGINAL
Decision/ Order
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, Exhibits Thereto	**1**
Notice of Motion, Affirmation in Support, Exhibits thereto.....	**2**

This Decision having been filed previously, was not transmitted in its complete form. The Court hereby resubmits the original decision rendered as follows. Please note the bolded and underlined portion which was omitted from the original during transmission and entered in the Clerk's Office on July 9, 2019.

Order takes into consideration two separate application which are decided as follows: Upon deliberation of the application duly made by the defendants, LEAKE AND WATTS SERVICES, INC. (hereinafter " Leake and Watts), by **NOTICE OF MOTION,** and all the papers in connection therewith, for an Order, pursuant to CPLR §2221(d), granting Leake and Watts leave to renew and reargue its prior motion for summary judgement, and upon renewal, granting Leake and Watts summary judgement, dismissing plaintiff's Complaint, is heretofore granted in part. Upon deliberation of the application duly made by defendant ASIALONE A. EDWARDS (hereinafter "Edwards"), by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §§ 2221(d) and 2221(e), granting defendant Edwards leave to renew and reargue her motion for summary judgement, which was decided by this Court of by Decision and Order dated December 18, 2018, and upon renewal, granting Edwards summary judgement, dismissing the Complaint as against Edwards, is heretofore granted in part.

This is an action for personal injuries allegedly sustained by plaintiff, EDUARDO SANDOVAL (hereinafter "Sandoval" or "plaintiff"), a non-verbal young adult with severe autism, while he was a resident at a Leake and Watts group home located at 945 East 211 Street, Bronx, New York on the evening of June 2, 2012 or morning of June 3, 2012. It is alleged that plaintiff was burned with a potato masher during an evening outburst by either defendant WENDELL CHAVIES (hereinafter "Chavies") or Edwards, who were the sole employees on duty at the residence when the incident occurred. It appears that plaintiff was screaming in his room, attempted to run out of the facility, and was physically prevented from doing so. Edwards testified at an Examination Before Trial (hereinafter "EBT") that she was physically preventing plaintiff from running away and that Chavies eventually got plaintiff back into his room, but her back was turned so she did not know how. During a police investigation, burns consistent with a potato masher were discovered on plaintiff's body. It is alleged that one of the employees used the potato masher as a prod to get plaintiff back into her room. Plaintiff claims Leak and Watts are vicarious liable for the acts of Chavies and Edwards, and maintains claims of negligent hiring, retention, supervision and training against Leake and Watts. Plaintiff claims that Edwards committed a battery against plaintiff and was negligent in her supervision. Plaintiff also seeks punitive damages.

It should be noted from the outset that pursuant to this Court's March 11, 2019 Order, all parties' applications to renew and reargue were granted without opposition. As such, this Court will now continue to resolve the underlying applications for summary judgement by Leake and Watts and Edwards.

A party seeking summary judgement must demonstrate, *prima facie*, entitlement to judgement as a matter of law by presenting sufficient evidence to negate any issue of material fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1983). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. See Zukerman v. City of New York, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. Winegrad, 64 N.Y.2d at 853.

Leake and Watts has failed to made a *prima facie* showing of entitlement to summary judgement with respect to the claims of vicarious liability, hiring, retention, supervision and training.

Under the doctrine of *respondent superior*, an employer may be held vicariously liable for a tort committed by its employee, but only if the "tortious conduct is generally foreseeable and natural incident of employment." *See* Judith M. Sister of Charity Hosp., 93 N.Y.2d 932, 933 (1999). If the employee departs from his duty that his acts constitute and abandonment of his services, the employer would not be liable. *Id* at 933.

The Court finds that Leake and Watts have not affirmatively demonstrated what their policy was with respect to potentially physical confrontations with residents at the facility. Leake and Watts reference a Strategic Crisis Intervention Prevention ("SCIP") program which allegedly teaches Residential Habilitation Assistants techniques to handle crisis prevention and interventions. Defendant does not provide a copy of the materials given to their employees, results of the exams allegedly administered or any specific progress reports with respect to Edward's training

prior to the accident. Moreover, Leake and Watts claim that all employees received an Employee Handbook which explicitly prohibits all form of abuse, however, they do not attach it to their motion for summary judgement. Simply, Leake and Watts have not affirmatively demonstrated to the Court, for the purposes of summary judgement, what instructions were given to any employee, in particular, Chavies and Edwards, with respect to force allowable in a physical altercations and in potential self defense situations with a resident, and what training they were specifically given with respect to physical altercations with a potentially aggressive **resident. Without more, it cannot be said, as a matter of law, that the Leake and Watts's employee was not acting within their perceived scope of employment.**

Moreover, there are clear issues of fact that preclude this Court from granting summary judgement at this time with respect to negligent hiring or retention. More specifically, there appears to be an issue of fact as to whether Leake and Watts defied their own hiring protocol by hiring defendant Chavies without checking the reference from the most recent employment that Chavies was terminated from at Ferncliff Manor. Like Leake and Watt, Ferncliff Manor is another residential facility that houses developmentally disabled individuals. It is not clear to this Court why Ferncliff Manor terminated Chavies, and what notice that would have put Leake and Watts on with respect to Chavies.

Moreover, this Court finds that issues of fact preclude this Court from granting Edwards summary judgement at this time. More specifically, the fact that Chavies and Edwards were the only employees working on the night in question, the inconclusiveness of the police investigation as to who used to potato masher and the affidavit submitted by Chavies in response to a default judgement against him where he professed his innocence, the fact that an internal Leake and Watt investigation was made and both Edwards and Chavies were terminated from employment, create, at the very least, an issue of fact as to what occurred on the evening of June 2 or morning of June 3, 2012. Such a determination is best left to a jury. It should be noted that Chavies was never deposed in this matter.

Finally, Leake and Watts's application to dismiss plaintiff's claim for punitive damages is heretofore denied. The explicit language in plaintiff's Complaint ties the demand to punitive damages to the other causes of action alleged. *See* La Porta v. Alacra, Inc., 132 A.D.3d 851 (1st Dept. 2016). As such, the claim for punitive damages is properly plead herein and will not be dismissed.

Accordingly, it is:

ORDERED that the application by Leake and Watt and Edwards to renew and reargue their prior motions for summary judgment, are heretofore granted. It is further

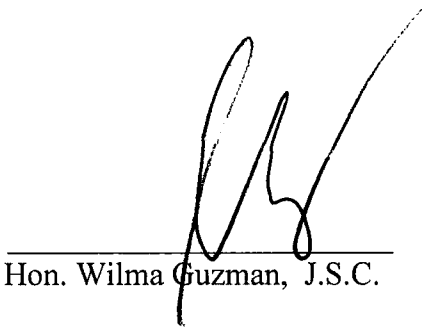
ORDERED that the application by Leake and Watts, for an Order, pursuant to CPLR §3212, granting Leake and Watt summary judgement, dismissing the Complaint as against Leake and Watts, is heretofore denied. It is further

ORDERED that the application by Edwards, for an Order, pursuant to CPLR §3212,granting Edwards summary judgement, dismissing the Complaint as against Edwards, is heretofore denied. It is further

ORDERED that Leake and Watt shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this order.

The forgoing constitutes the Decision and Order of the Court.

Originally Dated: July 5, 2019
Re-signed: July 8, 2020



Hon. Wilma Guzman, J.S.C.