

Mitchell v Just Lorraine's Place, LLC
2021 NY Slip Op 31845(U)
June 2, 2021
Supreme Court, New York County
Docket Number: 156781/2017
Judge: Erika M. Edwards
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS

PART 11

Justice

-----X

CAROLYN MITCHELL,

Plaintiff,

- v -

JUST LORRAINE'S PLACE, LLC,

Defendant.

INDEX NO. 156781/2017

MOTION DATE 09/30/2020,
11/06/2020

MOTION SEQ. NO. 002, 003

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the court grants Defendant Just Lorraine's Place's ("Defendant") motion for summary judgment dismissal of Plaintiff Carolyn Mitchell's ("Plaintiff") complaint under motion sequence 003 and denies as moot Defendant's motion to vacate Plaintiff's Note of Issue and Certificate of Readiness and to strike the matter from the trial calendar under motion sequence 002.

Plaintiff filed this action to recover damages for an alleged assault by three men outside of Defendant's bar that occurred on June 24, 2017. Plaintiff, who is a member of the LGBTQ community, alleges in substance that the three men were patrons of the bar and the attack was a hate crime. One of the men had a verbal dispute with Plaintiff while they were both inside of the bar. Plaintiff further alleges that she brushed it off, went to the bathroom, finished her drink and then she left the bar. Plaintiff moved her car, double-parked it in the front of the bar and went back inside of the bar. A couple of minutes later, Plaintiff left again to speak on the phone and

she observed the man park his car behind hers, remove a bat from his trunk and he and two other men attacked Plaintiff by striking her with the bat, cutting her in the face with a sharp object and punching her. Plaintiff further alleges that immediately prior to the attack, one of Defendant's employees closed and locked the door to the bar so Plaintiff was unable to seek refuge inside of the location.

Defendant moves to vacate Plaintiff's Note of Issue and Certificate of Readiness, dated September 10, 2020, and to strike this matter from the trial calendar because discovery is still outstanding under motion sequence 002. Defendant argues in substance that Plaintiff failed to respond to Defendant's correspondence, dated May 20, 2019, and the court's order, dated March 10, 2020, requiring Plaintiff to provide Defendant with authorizations to obtain Plaintiff's additional medical records. It appears that Plaintiff subsequently provided said authorizations via email, but failed to provide original authorizations.

Since the court grants Defendant's summary judgment motion, the court denies Defendant's motion as moot.

Defendant moves for summary judgment dismissal of Plaintiff's complaint under motion sequence 003. Defendant alleges in substance that Defendant is entitled to summary judgment as a matter of law because Defendant owed no duty to Plaintiff, the alleged assault occurred outside of the premises, it was unforeseeable and it did not involve any of Defendant's employees. Defendant further alleges that the only two employees working at the time of the alleged incident were women bartenders, so no men were working. Therefore, none of the three attackers were employees of the bar.

Defendant further alleges that even if it is true that one of the employees locked the door to the bar, Defendant cannot be held liable because such action did not rise to the level of an

affirmative tortious act done as part of the ordinary duties of her employment and it cannot be deemed as participation in the assault rising to the level of liability under a theory of respondeat superior. Alternatively, Defendant argues that even if Defendant owed a duty to Plaintiff, then the employee's actions were outside the scope of her employment since Plaintiff alleges the attack was motivated by hate, which would be personal in nature.

Plaintiff opposes Defendant's summary judgment motion and argues in substance that there are questions of fact regarding Defendant's role in Plaintiff's attack. Plaintiff argues in substance that Defendant is liable for Plaintiff's injuries because the dispute started inside of the bar and Defendant's employee's actions of closing and locking the door were within the scope of her employment. Additionally, Plaintiff argues that Defendant did not have any procedures, protocols, employee manuals or established practice regarding how employees should handle a situation like Plaintiff's attack, so the employee's actions cannot be deemed to be outside of the scope of her employment.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, Plaintiff must prove that Defendant owed her a duty to use reasonable care, that Defendant breached that duty and that Plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]).

Courts have long held that an employer is vicariously liable for the negligent, wanton or even willful acts committed by its employee acting within the scope of his or her employment under the doctrine of respondeat superior (*Riviello v Waldron*, 47 NY2d 297, 302 [1979]). An employee's actions have been held to be within the scope of his or her employment when he or she is doing something in furtherance of the duties he or she owes to his or her employer and "where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities" (*Lundberg v State*, 25 NY2d 467, 470-471 [1969][internal citations and quotations omitted]). Acts within the scope of employment are acts performed with the purpose of furthering the employer's interest, or carrying out duties incumbent upon the employee in furthering the employer's business (*Stavitz v City of New York*, 98 AD2d 529, 531 [1st Dept

1984]). However, if the employee's actions are not job related, but wholly personal in nature, then his or her conduct does not fall within the scope of his or her employment and the employer is not liable under respondeat superior (*id.*).

Here, the court finds that Defendant met its burden of establishing a prima facie showing of entitlement to judgment in its favor as a matter of law and Plaintiff failed to raise any issues of material fact necessary to defeat this motion. Based upon the admissible evidence, even when considering it in the light most favorable to Plaintiff, the court finds that Defendant had no liability for Plaintiff's injuries. Defendant's employees were not involved in the attack against Plaintiff, they did not participate in nor encourage the attack, the attack occurred outside of the bar and Defendant did not control the area outside of the bar. Additionally, there was no evidence that the attack was foreseeable to Defendant's employees merely because Plaintiff and one of her attackers had a verbal altercation inside of the bar. Here, the argument seemed to have ended between Plaintiff and one of her attackers since both parties left the bar and between the verbal altercation and the attack, Plaintiff went to the bathroom, finished her drink, left the bar twice and moved her car.

Furthermore, the court is not persuaded by Plaintiff's arguments that Defendant should be held liable for its employee's actions of allegedly closing and locking the door when the attack was about to occur. Defendant owed no duty to Plaintiff at that time and such conduct did not rise to the level of negligence or an affirmative tortious act requiring Defendant's liability under the theory of respondeat superior, regardless of whether the act was within or outside of the scope of the employee's employment.

As such, although the alleged attack against Plaintiff is a deplorable, heinous crime, the court finds that Defendant owed no duty to Plaintiff at that time, so the court grants Defendant's

summary judgment motion and dismisses Plaintiff's complaint with prejudice and without costs to either party.

Therefore, it is hereby

ORDERED that the court denies as moot Defendant Just Lorraine's Place's motion to vacate Plaintiff Carolyn Mitchell's Note of Issue and Certificate of Readiness and to strike it from the trial calendar under motion sequence 002; and it is further

ORDERED that the court grants Defendant Just Lorraine's Place's motion for summary judgment dismissal of Plaintiff Carolyn Mitchell's complaint under motion sequence 003 and the court dismisses the complaint with prejudice and without costs to either party.

This constitutes the decision and order of this court.

6/2/2021
DATE


ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

☒

CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

OTHER

☐

REFERENCE