

Illescas v Sabor Latino I, Corp.
2022 NY Slip Op 31543(U)
May 4, 2022
Supreme Court, Kings County
Docket Number: Index No. 505447/2018
Judge: Carl J. Landicino
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.

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 4th day of May, 2022.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

-----X

MARCO ILLESCAS,

Plaintiff,

Index No. 505447/2018

- against -

DECISION AND ORDER

SABOR LATINO I, CORP., SABOR LATINO CORP, SABOR LATINO EVENTS CORP., SABOR LATINO LOUNGE, INC., "ABC SECURITY COMPANY" (fictitious name, real name unknown at this time) and "JOHN DOE",

Defendants,

Motion Sequence #1

-----X

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed 22-34, 39, 40,

Opposing Affidavits (Affirmations)..... 44-45,

Reply Affidavits (Affirmations) 47-53

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

The Plaintiff Marcos Illescas (hereinafter the "Plaintiff") alleges in his complaint that on March 19, 2017 he suffered personal injuries after he was allegedly assaulted both inside and in front of a restaurant located at 95-35 40th Road in Queens, City and State of N.Y. (hereinafter referred to as the "Property"). The Plaintiff raises cause of action for negligent hiring, retention and supervision as against Defendants Sabor Latino I, Corp., Sabor Latino Corp., Sabor Latino Events Corp., Sabor Latino Lounge, Inc. (hereinafter referred to as the Sabor Defendants) and "ABC Security Company" (a fictitious name, real name unknown at this time).

The Sabor Defendants now move (motion sequence #1) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Plaintiff's cause of action against them for negligent hiring, retention and supervision. The Sabor Defendants contend that they did not owe the Plaintiff a duty of care with respect to the incidents that allegedly occurred on March 19, 2017. Specifically, the Sabor Defendants argue that they were not responsible for the alleged assault against the Plaintiff because the Sabor Defendants contend that they contracted with an individual who was responsible for hiring and managing the security staff for the Premises and the person that the Plaintiff claims assaulted him was therefore was not an employee of the Sabor Defendants. The Sabor Defendants also contend that they cannot be held vicariously liable for the Plaintiff's personal injuries given that the actions purportedly taken by the security guard were not within the scope of that security guard's employment and that the security guard had no history of, or a propensity for, the violent acts as alleged.

The Plaintiff opposes the motion. The Plaintiff contends that the motion should be denied as defective given that the Sabor Defendants failed to include a Statement of Material Facts pursuant to Uniform Civil Rule 202.8-g(a) and the required Word Count certification pursuant to Uniform Civil Rule 202.8-b.¹ The Plaintiff also states that the N.Y.P.D. documents are not certified and as a result are inadmissible.² The Plaintiff also argues that the Sabor Defendants have failed to provide sufficient evidence to meet their *prima facie* burden. Specifically, the Plaintiff argues

¹ As an initial matter, the Court notes that while the Sabor Defendants initially failed to include Statement of Material Facts pursuant to Uniform Civil Rule 202.8-g(a) and the required Word Count certification pursuant to Uniform Civil Rule 202.8-b, those documents were submitted (see NYSCEF documents 39 and 40) on October 21, 2021, prior to the Plaintiff having submitted his Affirmation in Opposition on November 10, 2021. As a result the Court finds that the Sabor Defendants were in substantial compliance with Uniform Civil Rule 202.8(a) and (b).

² The Court notes that the Sabor Defendants rely on NYPD documents (see Sabor Defendants' Motion, Exhibits 7, 8, 9, 10, 11) that are not certified. Given that these documents are not certified and are not otherwise adopted or utilized by the Plaintiff, they are inadmissible and will not be considered in relation to this Decision and Order. *See Yassin v. Blackman*, 188 AD3d 62, 66, 131 N.Y.S.3d 53, 56 [2d Dept 2020].

that while the Sabor Defendants contend that the security guards at the Premises were hired by an independent contractor, the Sabor Defendants have not provided a contract detailing the agreement between the Sabor Defendants and the independent contractor or any other proof supporting the Sabor Defendants' contentions. The Plaintiff also contends that there are issues of material fact as to whether the security worker, who purportedly forcibly removed Plaintiff from the restaurant, was acting within the scope of his employment with the Sabor Defendants.

Summary 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 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 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 the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

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"

Garnham & Han Real Estate Brokers v Oppenheimer, 148 AD2d 493 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

The Plaintiff contends that he was injured at the restaurant owned and managed by the Sabor Defendants as a result of the actions of security guards who were working there. When asked who he was with at the restaurant, the Plaintiff stated (Sabor Defendants' Motion, Exhibit 4, Page 16) "[m]y high school friends." When asked how the situation at issue occurred, the Plaintiff initially stated that he had returned from the bathroom and "I approached to see what was happening, and they were putting force on Hector because he requested drinks that he did not pay." When asked what happened next, the Plaintiff stated (Sabor Defendants' Motion, Exhibit 4, Page 22) "[a]nd then suddenly one of them grabbed me from behind on the neck with a left hand and forced me out of the restaurant." When asked who took part in this purported altercation on behalf of the restaurant, the Plaintiff stated (Sabor Defendants' Motion, Exhibit 4, Page 22) "[t]here were two bouncers and a gentleman that was with a suit on that he's always there." The Plaintiff further stated that (Sabor Defendants' Motion, Exhibit 4, Page 25), "I had a bouncer behind me who grabbed me by the back through the neck and forced me out, without me doing anything." When asked to more specifically describe the security guards' actions, the Plaintiff stated that (Sabor Defendants Motion, Exhibit 4, Page 28), "[h]e was suffocating me, taking me out towards the exit, um, by the street and hitting me at the same time." The Plaintiff also stated that (Sabor Defendants' Motion, Exhibit 4, Page 28), the security guard "threw me on the floor, and that's how I fractured part of my face."

The Court finds that the moving defendants have failed to establish that they cannot be held liable for the alleged actions of the parties who allegedly assaulted the Plaintiff. The Sabor Defendants claim that the security guards were in the employ of an independent contractor. However, the Sabor Defendants have failed to 1) identify the independent contractor with any specificity, 2) indicate whether there was a contract between that independent contractor and the Sabor Defendants, and 3) what the terms of the agreement were. To support their position, the Sabor Defendants rely exclusively on the deposition testimony of Juan Salvador Inga (“Mr. Inga”), the purported president of Sabor Latino Corp. When asked whether he was working at the restaurant the night in question, he stated (Sabor Defendants’ Motion, Exhibit 5, Page 12) “[y]es.” When asked if he was familiar with a man named David that managed security for the restaurant, Mr. Inga stated “[y]es.” When asked if he knew what David’s last name was, he answered (Sabor Defendants’ Motion, Exhibit 5, Page 13) “[n]o.” When asked what David’s responsibility was, Mr. Inga stated (Sabor Defendants’ Motion, Exhibit 5, Page 14) “[h]e was in charge of security.” When asked to explain David’s role, Mr. Inga stated (Sabor Defendants’ Motion, Exhibit 5, Page 15) “[w]e would pay David and David would pay his employees, and then he would also be the one in charge to assign the positions, the jobs to the other people.” When asked if there was a contract or other written agreement between himself and/or the Sabor Defendants and David, Mr. Inga stated “I don’t remember.” (Sabor Defendants’ Motion, Exhibit 5, Page 16) When asked if he knew whether David had a company that provided security that David formed himself or that David worked for such a company, Mr. Inga stated (Sabor Defendants’ Motion, Exhibit 5, Page 20) “I don’t know.” This testimony, taken together is insufficient to show that as a matter of law the Sabor Defendants cannot be held liable for the Plaintiff’s claims because the incident alleged was the result of conduct by employees of an independent contractor.

The Court also finds that the Sabor Defendants have failed to establish that the unnamed security guard was not acting within the scope of his employment with the Sabor Defendants. “When a business employs security guards or bouncers to maintain order, the use of physical force may be within the scope of their employment.” *Norwood v. Simon Prop. Grp., Inc.*, 200 AD3d 891, 159 N.Y.S.3d 482, 486 [2d Dept 2021]; see also *Fauntleroy v. EMM Grp. Holdings LLC*, 133 AD3d 452, 453, 20 N.Y.S.3d 22, 23 [2d Dept 2015]. Mr. Ingas provided no testimony regarding conversations he had, or anyone else representing the Sabor Defendants had, with David regarding the conduct or training of the security guards.³ Instead, when asked about the behavior of the security guards on the night in question, Mr. Ingas stated (Sabor Defendants’ Motion, Exhibit 5, Page 43) that he told David after the conflict occurred “[t]hat wasn't the way to remove a person. That wasn't part of the job.” Although Mr. Ingas stated that the unnamed security guard may have been overly aggressive, he did not say whether the security guard was acting within the scope of his employment generally. “An employee's action may be considered to be within the scope of employment when it ‘is performed while the employee is engaged generally in the business of the employer, or if the act may be reasonably said to be necessary or incidental to such employment.’” *Kelly v. Starr*, 181 AD3d 799, 801, 120 N.Y.S.3d 373, 375 [2d Dept 2020], quoting *Scott v. Lopez*, 136 AD3d 885, 886, 25 N.Y.S.3d 298, 300 [2d Dept 2016].

The Court finds that the Sabor Defendants have failed to adequately address whether David or the unnamed guard had a prior violent history at the Premises. See *Sandra M. v. St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 877, 823 N.Y.S.2d 463 [2nd Dept 2006]. When Mr. Ingas was asked whether he knew whether David was ever convicted of a crime he stated “[n]o.” When Mr.

³ The Sabor Defendants provide an affidavit of Mr. Inga and a purported “Employee Handbook”, payroll records and other documents for the first time as part of their Reply Affirmation (See Reply Affirmation, Exhibit 5). However, it is not appropriate to submit new evidence as part of the Reply Affirmation. See *Duran v. Milord*, 126 A.D.3d 932, 933, 7 N.Y.S.3d 176, 177 [2d Dept 2015].

Ingas was asked whether he had ever asked David that question he stated (Sabor Defendants' Motion, Exhibit 5, Page 18) "[n]o." When asked if he had ever asked David if he had a license to perform security work, Mr. Ingas stated "[n]o." There is no further testimony in this regard. See *Jackson v. New York Univ. Downtown Hosp.*, 69 AD3d 801, 801, 893 N.Y.S.2d 235, 236 [2d Dept 2010]. Accordingly, the motion by the Sabor Defendants is denied.

Insofar as the Defendants failed to meet their *prima facie* burden, we need not consider the sufficiency of the Plaintiff's opposition papers. See *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 AD3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Sabor Defendants (motion sequence #1) for summary judgment is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.