

Perez v City of New York
2022 NY Slip Op 31922(U)
June 17, 2022
Supreme Court, New York County
Docket Number: Index No. 159330/2016
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. JUDY H. KIM</u></p> <p style="text-align: right; margin-right: 100px;"><i>Justice</i></p> <p>-----X</p> <p>HECTOR PEREZ,</p> <p style="text-align: center; margin-left: 200px;">Plaintiff,</p> <p style="text-align: center; margin-left: 150px;">- v -</p> <p>THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION, JOHN DOE</p> <p style="text-align: center; margin-left: 150px;">Defendants.</p> <p>-----X</p>	<p>PART</p> <p>INDEX NO. <u>159330/2016</u></p> <p>MOTION DATE <u>04/12/2022</u></p> <p>MOTION SEQ. NO. <u>002</u></p> <p style="text-align: center; margin-top: 20px;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing papers, the motion by defendants the New York City Department of Sanitation (“DOS”) and the City of New York (collectively, the “City”) for summary judgment dismissing the complaint is granted in part for the reasons set forth below.

Plaintiff alleges that on June 17, 2016, he was assaulted by an employee of defendant DOS (NYSCEF Doc. No. 1 [Complaint at ¶24]). At his examination before trial (“EBT”) plaintiff testified that he was driving his taxicab eastbound on East 92nd Street when he encountered a DOS truck blocking his path (NYSCEF Doc. No. 30 [Perez EBT at ¶22]). The driver of the DOS truck—a DOS employee named Hector Gonzalez—told plaintiff there was space for him to pass but plaintiff disagreed (*Id.* at ¶31; NYSCEF Doc. No. 31 [Gonzalez EBT]). At some point during this disagreement plaintiff got out of his car, after which this disagreement grew increasingly contentious, culminating in Gonzalez punching plaintiff in the face (NYSCEF Doc. No. 30 [Perez EBT at ¶¶32-34]).

Plaintiff commenced this action on November 4, 2016, asserting causes of action against the City for: (1) negligence, under the doctrine of respondeat superior, and (2) negligent hiring, training, and/or supervision of Gonzalez. The City now moves for summary judgment in its favor arguing that the doctrine of respondeat superior does not apply because Gonzalez was acting outside the scope of his employment when he assaulted Perez and that the negligent hiring claim must be dismissed because the City has established it had no indication of any violent propensity on the part of Gonzalez.

In support of this latter argument, the City submits the affidavit of Christopher Morella, Esq., Associate Counsel for the DOS Bureau of Legal Affairs, attesting that he reviewed Gonzalez's DOS personnel file which allegedly records that, at the time of his hiring on September 20, 1999, Gonzalez reported that he was never previously convicted of a crime and had no criminal charges pending (NYSCEF Doc. No 33 [Morella Aff. at ¶4]). Based on his review of this file, Morella further attests that, prior to the subject incident, Gonzalez "had no complaints or disciplinary history that involved any confrontations or physical interactions with members of the public" (*Id.* at ¶8). The City did not submit the personnel file referenced by Morella, on the grounds that "disclosure of the file itself is not permitted without an authorization from Gonzalez, who is a now retired employee from DOS" but offers to produce this personnel file for in-camera review at the Court's request (NYSECF Doc. No. 25 [Smith Affirm. at fn. 2]).

In opposition plaintiff argues, in essence, that the assault by Gonzales was within the scope of his employment as a DOS truck driver because it was foreseeable that a DOS truck would block traffic, leading to arguments with other drivers. Plaintiff also notes that Gonzales testified during his EBT that he had been involved in "altercations" prior to being hired by DOS (NYSCEF Doc. No. 31 [Gonzalez EBT at pp. 68-69]) and argues that "[t]here is absolutely no evidence presented

... that the Department of Sanitation ever inquired as to Gonzalez's history of being involved in these altercations prior to his being hired" (NYSCEF Doc. No. 41 [Graci Affirm. in Opp. at p. 5]).

DISCUSSION

On a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, their right to judgment, after which the burden shifts to the opposing party to proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (Zuckerman v. City of New York, 49 NY2d 557 [1980]). DOS has established, as a matter of law, that no negligence claim lies against it here. As a rule, "employers are held vicariously liable for their employees' torts only to the extent that the underlying acts were within the scope of the employment" (Adams v New York City Tr. Auth., 88 NY2d 116, 119 [1996] [internal citations omitted]). Whether an employee acted within the scope of employment is generally a fact-based inquiry but may be resolved on summary judgment where, as here, the material facts are undisputed (Riviello v Waldron, 47 NY2d 297. 302–303 [internal citations omitted]).

In this case, Gonzalez's assault on Perez was not within the scope of his employment as a truck driver for DOS (See Salva v City Waste Services of New York, Inc. 2011 WL 11069862 [Sup Ct, Bronx County 2011] [defendant City was not vicariously liable for its sanitation truck driver's assault of plaintiff in culmination of traffic dispute and verbal altercation between plaintiff and Lopez]). Plaintiff argues that this assault was within the scope of Gonzalez's employment because it stemmed from the exercise of Gonzalez's professional judgment in selecting the location to stop the DOS truck. However, this connection is too attenuated to bring the assault within the scope of Gonzalez's employment as ultimately, the prospect of violence is not an express or reasonably anticipated part of the occupation of a DOS truck driver (Cf. Salem v MacDougal Rest.

Inc., 148 AD3d 501, 502 [1st Dept 2017] [trial court properly denied motion by defendant MacDougal Restaurant Inc. for summary judgment dismissing respondeat superior claim because it could not be concluded as a matter of law that bouncer employed by movant was acting outside the scope of his employment in assaulting plaintiff outside movant's bar]). Accordingly, that branch of defendants' motion for summary judgment dismissing the first cause of action is granted and the Court turns to defendants' motion to dismiss the second cause of action for negligent hiring, training, and supervision of Gonzalez.

This branch of DOS's motion is denied. A negligent hiring claim is "made out when a plaintiff can establish that the employer was on notice that its employee had a propensity to commit the acts that form the basis of the complaint" (Summors v Port Auth. of New York and New Jersey, 203 AD3d 558 [1st Dept 2022] citing Sandoval v Leake & Watts Serv., Inc., 192 AD3d 91, 99 [1st Dept 2020]). To demonstrate its prima facie entitlement to summary judgment, the City must submit proof of lack of such notice (Id. citing White v Hampton Mgt. Co., LLC, 35 AD3d 243, 244 [1st Dept 2006]). The City has not done so.

In support of this branch of its motion the City relies upon the affidavit of its counsel, Morella, but the representations in his affidavit are based on his review of personnel records that have not been submitted to the Court. As a result, Morella's affidavit is hearsay and has no probative value (See e.g., U.S. Bank N.A. v 22 S. Madison, LLC, 170 AD3d 772, 774 [2d Dept 2019]). The Court declines the City's offer to review Gonzalez's personnel file in camera. As a threshold matter, the Court fails to grasp why the City believes it is prohibited from attaching this personnel file as an exhibit to its motion but may submit it for in camera review¹. Even leaving

¹ The Court notes that where a "plaintiff has sufficiently alleged a claim against defendants for negligent hiring, training and supervision, the officers' personnel files are discoverable" (Chavez v City of New York, 33 Misc 3d 1214(A) [Sup Ct, NY County 2011], affd., 99 AD3d 614 [1st Dept 2012] [internal citations omitted]).

this aside, it is not clear what the City is asking the Court to do after reviewing this personnel file. To the extent the City may be requesting that the Court review the personnel file and, if appropriate, order its production to plaintiff, sua sponte, this is far beyond the scope of the instant motion. The only other course apparent to the Court—that it engage in an ex parte review of material that is potentially dispositive to this motion after the motion has been fully submitted and then rule on the motion without affording plaintiff the opportunity to review and respond to this material—is so inherently prejudicial to plaintiff as to merit no further discussion.

In any event, even if the City had demonstrated that it did not possess any notice of any dangerous propensities on the part of Gonzalez at the time of his hiring, summary judgment would only be appropriate, as a matter of law, if it further demonstrated that it had no such notice despite taking “all reasonably necessary measures to evaluate [Gonzalez’s] fitness at the time of his hiring” (Pratt v Ocean Med. Care, P.C., 236 AD2d 380, 381 [2d Dept 1997]). The City has not done so.

In light of the foregoing, it is hereby

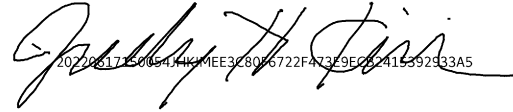
ORDERED that the motion by the City of New York and New York City Department of Sanitation for summary judgment dismissing the complaint as against them is granted in part, solely as to the first cause of action for negligence, and is otherwise denied; and it is further

ORDERED that counsel for the movant shall serve a copy of this decision and order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E filing” page on this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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6/17/2022

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE