

Gupta v YM Pro Corp
2022 NY Slip Op 33319(U)
September 30, 2022
Supreme Court, New York County
Docket Number: Index No. 153384/2020
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LORI S. SATTLER PART 02TR

Justice

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CHRIS GUPTA,

Plaintiff,

- v -

YM PRO CORP, VARONE BROWN

Defendant.

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INDEX NO. 153384/2020
MOTION DATE 07/21/2022
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - SUMMARY.

In this action alleging assault and battery, defendant YM Pro Corp moves for summary judgment pursuant to CPLR 3212 dismissing the complaint and directing summary judgment in favor of YM Pro Corp. Plaintiff Chris Gupta ("Plaintiff") opposes the motion. Defendant Varone Brown ("Brown") has not appeared in this action and, pursuant to the Court's March 22, 2021 Decision and Order, is subject to a default judgment as to liability (NYSCEF Doc. No. 18).

This action arises from an alleged assault and battery perpetrated by Brown against Plaintiff on January 17, 2020. At the time of the incident, Plaintiff was employed by nonparty Royal Home Builders as a site superintendent and was working at a job site located at 1670 East 39th Street in Brooklyn, New York ("the job site"). As part of his superintendent duties, Plaintiff was tasked with checking workers' OSHA cards and removing them from the job site if they failed to present their cards.

Royal Home Builders was the general contractor for the construction work at the site and retained YM Pro Corp as a subcontractor. Brown was employed by YM Pro Corp as a "helper"

tasked with assisting mechanics with unskilled labor with various tasks. YM Pro Corp's work at the job site was overseen by a project manager.

Plaintiff testified in his deposition that Brown exhibited a hostile disposition to other workers at the job site. He specifically stated that "it looked like [Brown] was always trying to get . . . into an argument or a fight with somebody" (NYSCEF Doc. No. 31, Gupta EBT at 49-50), that workers at the job site believed "Brown was crazy" and that he had been told that YM Pro Corp was aware of this (*id.*). Plaintiff further testified that, prior to the incident, Brown told him that he had had "put a voodoo curse" on him (*id.* at 54). According to Plaintiff, YM Pro Corp's project manager had received complaints about Brown from YM Pro Corp's other employees (*id.* at 50). YM Pro Corp's owner and principal testified that he was never made aware of any of Brown's allegedly hostile or erratic behavior (NYSCEF Doc. No. 32, Rubinstein EBT at 53).

On the day of the incident, Plaintiff asked Brown for his OSHA card on multiple occasions. Brown refused each request, first by ignoring Plaintiff and later by verbally confronting Plaintiff. After Brown's third refusal to show his OSHA card, Plaintiff told Brown that he would have to leave the job site. Plaintiff then called YM Pro Corp's project manager, who was not on site at the time, to report Brown's failure to present his card and to tell the project manager that Brown would have to leave the site. Brown then received a phone call from one of YM Pro Corp's employees, after which Plaintiff again instructed Brown to leave the job site. At this point, Brown struck Plaintiff and knocked him to the ground. Brown then proceeded to beat Plaintiff with a piece of rebar, causing Plaintiff to suffer injuries. Plaintiff removed himself from the situation and was subsequently struck in the face by Brown, who then

fled the scene before the police arrived. Plaintiff states that he was hospitalized with a broken nose and lumbar transverse process fracture as a result of the incident.

Plaintiff commenced this action on May 27, 2020, asserting causes of action for YM Pro Corp's vicarious liability and negligent supervision resulting from Brown's assault of Plaintiff. YM Pro Corp now moves for an order pursuant to CPLR 3212 dismissing these causes of action and directing summary judgment in its favor.

In a motion for summary judgment, the moving party "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). After the movant makes this prima facie showing, "the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" such that trial of the action is required (*id.*). The Court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

YM Pro Corp first seeks summary judgment dismissing Plaintiff's first and second causes of action for vicarious liability. An employer may be held vicariously liable for an intentional tort committed by an employee "if the employee was acting 'within the scope of [his or her] employment' at the time" the tort was committed (*Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [1st Dept 2005], quoting *Riviello v Waldron*, 47 NY2d 297, 303 [1979]). However, "[a]n employer cannot be held vicariously liable for an alleged assault where the assault was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer" (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 204-205 [1st Dept 2001]).

Here, there is no dispute of material fact as to whether the assault was within the scope of Brown's employment with YM Pro Corp. Brown was hired as a "helper" with YM Pro Corp, in which he was tasked with performing unskilled labor on various projects on construction sites worked by YM Pro Corp. Nowhere is it alleged that Brown was hired to perform work that might involve the use of physical force against another person (*see Ramos*, 21 AD3d at 745). Similarly, there is no dispute of material fact as to whether YM Pro Corp condoned, instigated, or authorized Brown's assault of Plaintiff, and Plaintiff presents no facts suggesting that YM Pro Corp did so (*Yeboah*, 286 AD2d at 204-205).

Next, YM Pro Corp moves for summary judgment dismissing Plaintiff's third cause of action for negligent supervision. An employer may be held liable for its negligent supervision of an employee where the employer "knew of the employee's propensity to commit the tortious act or should have known of such propensity had the defendant conducted an adequate hiring procedure" (*N.X. v Cabrini Med. Ctr.*, 280 AD2d 34, 42 [1st Dept 2001]; *see also Yeboah* 286 AD2d at 205).

Here, the Court finds that, upon viewing the facts in a light most favorable to Plaintiff, there is a genuine dispute of material facts as to whether YM Pro Corp knew or should have known about Brown's alleged erratic behavior and/or propensity to commit violent acts. Plaintiff testified that, prior to the date of the incident, he believed that YM Pro Corp's employees had complained about Brown's behavior to YM Pro Corp. Plaintiff elaborated by testifying that "the general job site talk was that [Brown] was crazy or he was – you know" (*Gupta EBT* at 49). Regarding Brown's behavior, Plaintiff stated that "it looked like he was always trying to get in – get into an argument or a fight with somebody" (*id.* at 49-50) and that prior to the incident Brown told Plaintiff that he had "put a voodoo curse" on him (*id.* at 54).

Plaintiff further maintains that he believed that YM Pro Corp had been made aware of this, testifying that “I was told that YM Pro was aware of it, that [YM Pro Corp’s project manager] was aware of it” (*id.* at 50).

In contrast, YM Pro Corp’s owner testified in his deposition that he never heard reports or rumors of altercations or erratic behavior involving Brown (Rubenstein EBT at 53). The owner further testified that he never learned that Brown “attempted to put a curse on” Plaintiff or that “Brown would sometimes curse at people under his breath” (*id.*). The branch of YM Pro Corp’s motion dismissing Plaintiff’s negligent supervision cause of action is therefore denied.

Accordingly, it is hereby:

ORDERED that YM Pro Corp’s motion for summary judgment is granted to the extent of granting partial summary judgment in favor of YM Pro Corp and against Plaintiff on the first and second causes of action; and it is further

ORDERED that Plaintiff’s first and second causes of action are dismissed with prejudice; and it is further

ORDERED that the branch of the motion seeking an order for summary judgment dismissing of the third cause of action is denied; and it is further

ORDERED that the action shall continue as to the third cause of action; and it is further

ORDERED that all discovery is to be completed by October 28, 2022, and that that plaintiff is to file a Note of Issue by November 14, 2022. Parties may contact the Court if they wish to schedule a settlement conference.

9/30/2022

DATE

LORI S. SATTLER, 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