Murtazayev v Shalom Intl. Corp.
2023 NY Slip Op 30555(U)
February 16, 2023
Supreme Court, Kings County
Docket Number: Index No. 505636/2018
Judge: Wavny Toussaint
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of February 2023.

PRESENT:
HON. WAVNY TOUSSAINT,
Justice.

----------X

DILSHOD R. MURTAZAYEV,

Plaintiff,

- against-

Index No. 505636/2018

SHALOM INTERNATIONAL CORP., JOEY COHEN a/k/a JOEY MORRIS COHEN, TORATH ISRAEL SEPHARDIC CONGREGATION, OHEL DAVID & SHLOLMO and JERUSALEM VALET CORP.

Defendants.

DECISION AND ORDER

MOTION SEQ. #05 #04

----------X

SHALOM INTERNATIONAL CORP.,

Third-Party Plaintiff,

- against-

TORATH ISRAEL SEPHARDIC CONGREGATION, OHEL DAVID & SHLOLMO, JOEY COHEN a/k/a JOEY MORRIS COHEN, and JERUSALEM VALET CORP.,

Third-Party Defendants.

----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	63-73 86-95
Opposing Affidavits (Affirmations)	80-81, 83-84
Reply Affidavits (Affirmations)	85

Upon the foregoing papers in this personal injury action, defendant/third-party defendant Torath Israel Sephardic Congregation d/b/a Ohel David & Shlolmo ("Torath") moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint (Motion Seq. 4). Torath also moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint (Motion Seq. 5).

Factual Background

In this action premised on common-law negligence, plaintiff Dilshod R. Murtazayev ("plaintiff") alleges that he suffered injuries on June 11, 2017 when his vehicle was rear-ended by a motor vehicle owned by defendant/third-party plaintiff Shalom International Corp. ("Shalom") and allegedly driven by defendant "Joey Cohen" ("Cohen"), a valet driver employed by defendant Jerusalem Valet Corp. ("Jerusalem Valet"). On the day of the accident, the wedding of Rachel Dweck was being held at a synagogue owned by defendant Torath. The Dwecks entered a contract with Torath to use their venue for the wedding, but decided to contract with a valet service of their own choosing rather than use a valet service recommended by Torath. The Dwecks hired Jerusalem Valet to conduct valet parking services for the guests attending their wedding. Torath required that Jerusalem Valet provide it with a certificate of insurance before engaging in valet services at their premises, which it did.

Although Jerusalem Valet was operating at Torath's premises, plaintiff's accident occurred at or near 1020 Shore Parkway in Brooklyn, approximately four blocks away

from Torath's synagogue, which is located at 710 Shore Boulevard. Since Torath's synagogue did not have a parking lot, the valet drivers, who were working the wedding, had to find parking spaces for the guests' vehicles elsewhere. Shortly before the accident, Cohen was asked to search for a place to park a 2017 BMW, which was leased by Shalom. Shalom's principal, Steven Shalom, was a guest at the Dweck wedding. While Cohen was driving Shalom's vehicle to look for parking, he collided with the rear of plaintiff's vehicle, which was double-parked with its hazard lights on as plaintiff sat waiting for a parking spot to become available. In the aftermath of the collision, Cohen abandoned Shalom's vehicle and fled the accident scene. Plaintiff alleges that he suffered severe and permanent injuries as a result of the collision.

Procedural History

On or about March 21, 2018, plaintiff commenced this action by filing a summons and complaint against defendants Shalom and Cohen, asserting a common law negligence claim. Shalom joined issue on or about September 7, 2018. On or about August 15, 2019, Shalom filed a third-party summons and complaint naming Torath, Cohen, "Joey Morris Cohen"[1], and Jerusalem Valet as third-party defendants. Shalom asserts claims for common law negligence, common law indemnification, contribution, breach of contract, and contractual indemnification. Issue was joined by Torath on or about October 14, 2019. On or about July 23, 2020, plaintiff filed a second, separate action against Torath, "Joey Morris Cohen", and Jerusalem Valet, which was based on the same events as the

[1] "Joey Morris Cohen" is an alternate name for defendant Joey Cohen who has not appeared.

first.[2] Issue was joined by Torath in the second action on or about October 2, 2020, and a default judgment was granted against the remaining defendants on or about August 10, 2021. On or about December 29, 2020, Torath filed a motion to consolidate the two actions. Plaintiff has not yet filed a note of issue, and on or about June 8, 2022, this court granted Torath's motion to consolidate (NYSCEF Doc No. 76).

The Parties' Positions

Torath's Summary Judgment Motion

Torath moves for summary judgment seeking dismissal of plaintiff's negligence claim and Shalom's third-party claims against it. Torath argues that it cannot be held liable for plaintiff's accident because it is not responsible for its causation. In this regard, Torath contends that it is merely the party who furnished the condition or occasion for the occurrence of the accident and otherwise has no connection to any of the parties in the case. Torath asserts that it was Cohen, as an employee of Jerusalem Valet, who drove negligently, and thereby caused plaintiff's accident. Torath argues that it should not be held liable because plaintiff cannot establish that it owed any duty to him. Torath contends that the mere fact that the wedding was held at its synagogue does not create a duty to the plaintiff. Torath further argues that it cannot be held liable for plaintiff's injuries since it did not hire Jerusalem Valet, did not direct, control, or supervise Jerusalem Valet or its employees in any way, did not have a contract with Jerusalem Valet, did not furnish Jerusalem Valet with any materials or equipment, and the accident

[2] The second action was filed as *Murtazayev v Torath Israel Sephardic Congregation, et al.*,

did not occur on its property. Torath asserts there are no questions of material barring the court from granting summary judgment in its favor.

Plaintiff's Opposition

In opposition to Torath's motion, plaintiff argues that as the owner of the property where the valet drivers operated, Torath had a duty to control the foreseeable actions of the valet drivers and to prevent them from causing unreasonable harm to others. He argues that Torath failed to exercise due care, which resulted in plaintiff sustaining significant injuries. Plaintiff claims that Torath is liable because it entered a contract with the Dwecks that allowed them to host the wedding at its synagogue, but also allowed them to hire their own valet service, subject to Torath's approval. Plaintiff contends that since Jerusalem Valet had to check in with a Torath employee upon arrival; Torath had the ability to control Jerusalem Valet and its drivers. Plaintiff asserts that Cohen was an employee/contractor of Torath, and thus it can be held liable under the theory of *respondeat superior* for his negligent operation of Shalom's vehicle. Plaintiff argues that because Torath's synagogue does not have a parking lot, permitting valet parking for wedding guests enables it to host and profit from such events. He contends that there was no one in a better position than Torath to ensure the valet company provided competent drivers. In support of his argument that the drivers may not have been competent to drive, plaintiff refers to the deposition testimony of Steven Shalom ("Mr. Shalom"), Shalom's principal. Mr. Shalom testified that the valet drivers he observed working on the day of

---

under Index # 513314/2020.

the wedding appeared to be very young. It was his understanding that Jerusalem Valet had four other events for which it provided valet services on the day of plaintiff's accident, and that it had recruited young people from the surrounding neighborhood to work as valet drivers. Shalom did not know if any of these young people possessed driver's licenses. Plaintiff also asserts that testimony that Cohen fled the scene on foot after the accident is evidence of his incompetence to operate a vehicle. He further asserts that at the time of Jerusalem Valet's arrival at the wedding, Torath's employee on duty could have easily checked the driver's licenses of the valet drivers or, at the very least, could have met with the drivers and determined whether they were competent to operate vehicles. Plaintiff maintains that as the owner of the property, Torath had a duty to prevent Jerusalem Valet from creating a risk of unreasonable harm to people on the surrounding streets. Plaintiff therefore contends that Torath should be held liable because it took no steps to prevent the foreseeable harm and the injuries that resulted.

Shalom's Opposition

Shalom argues that a property owner, such as Torath, has a duty to exercise reasonable care in maintaining its property in a safe condition; to prevent harm to those on their property; and to control the conduct of third parties on their premises when they have the opportunity to control such persons. Shalom contends that because a wedding was taking place at Torath's premises and Jerusalem Valet was hired by the Dwecks subject to Torath's approval, Torath owed a duty to the plaintiff to control the foreseeable actions of the valet drivers operating on its property and to prevent them from causing

harm to others. Shalom asserts that Torath failed in its duties to the plaintiff because it had the ability to control Jerusalem Valet and its drivers and failed to do so. Shalom contends that based on the testimony of Isaac Elgadeh ("Elgadeh"), Torath's office manager, Torath assumed that the Jerusalem Valet drivers were licensed since it received a certificate of insurance from the company, but it had no proof that the company's drivers were of legal age to drive.

To further support its contention that Torath did not act with reasonable care and breached its duty to plaintiff, Shalom points out that the Certificate of Insurance Torath received from the owner of Jerusalem Valet was neither signed nor dated. By implication, Shalom contends that Torath should have noticed this defect and its failure to do so evinces negligence. Shalom also notes that contrary to what was indicated on the Certificate of Insurance it provided to Torath, Jerusalem Valet did not have any insurance, which apparently was fraudulent. Shalom also argues that Cohen was an employee/contractor of Torath, which is therefore liable under the theory of *respondeat superior*. Shalom asserts that due to the totality of the circumstances including the unsigned and undated certificate of insurance, Jerusalem Valet's approval by Torath, and its operation on Torath's property for a wedding that Torath entered into a contract to host, Torath had a duty to plaintiff and valet patrons to ensure that the Jerusalem Valet drivers were licensed and of legal age, and to avoid the unreasonable harm Jerusalem Valet caused while they were operating just outside of Torath's doors.

Torath's Reply

Torath maintains that the case law cited by plaintiff and Shalom in their opposition papers is inapposite, as such cases involve situations where there was a contract between the property owner and the valet company. Torath reiterates that it did not hire or have a contract with Jerusalem Valet; nor did it instruct or supervise Jerusalem Valet in any way. Therefore, Torath maintains that it did not owe a duty to plaintiff, who was four blocks away from its property when his accident occurred. Torath contends that both plaintiff and Shalom are speculating by asserting that Jerusalem Valet employed drivers who were underage, unlicensed, or otherwise incompetent to drive. It avers that since Mr. Shalom conceded during his deposition that he never saw Cohen when he worked the valet service, there is no evidence that he was unlicensed or incompetent. Torath asserts that plaintiff's argument that there is evidence that Cohen was not competent to drive based on his fleeing the scene of the accident is a "complete fabrication" (Reply Aff., NYSCEF Doc No. 85, p. 4). Torath posits that the theory of *respondeat superior* does not apply herein, and that plaintiff's allegation that Cohen was an employee/contractor of Torath is completely false. Torath cites the deposition testimony of Elgadeh as evidence that there was no employee/contractor relationship between it and Cohen. Specifically, it points out that Elgadeh stated that the Dwecks selected and hired Jerusalem Valet, and that there was no written agreement between it (Torath) and Jerusalem Valet. He further stated that Torath did not provide the valet drivers with any equipment or materials; did not have any dealings with Jerusalem Valet; never received any complaints regarding

Jerusalem Valet; and did not instruct the valet drivers where to park vehicles. Further, Torath argues that the contention of plaintiff and Shalom that, as a property owner, it had a duty to exercise reasonable care in maintaining its property in a safe condition is misplaced since the accident did not occur on its property. Torath reasserts that it bears no liability for plaintiff's accident and that the sole proximate cause of plaintiff's injuries was Cohen's negligence.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005]). "[T]he proponent of a summary judgment motion 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. If a movant fails to do so, summary judgment should be denied without reviewing the sufficiency of the opposition papers (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015], citing *Winegrad*, 64 NY2d 851).

If a movant meets the initial burden, parties opposing the motion for summary judgment must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). The court must then evaluate whether the issues of fact alleged by the opponent are

genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [2d Dept 1999]).

"[N]egligence cases do not generally lend themselves to resolution by summary judgment, since that remedy is appropriate only where the negligence or lack of negligence of defendant is established as a matter of law" (*Chahales v Garber*, 195 AD2d 585, 586 [2d Dept 1993]). The elements of a negligence cause of action are "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Abbott v Johnson*, 152 AD3d 730, 732 [2d Dept 2017], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). "The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" (*Fitzsimons v. Brennan*, 169 AD3d 873, 874 [2d Dept 2019]). "Absent a duty of care, there is no breach and no liability" (*Zhili Wang v Barr & Barr, Inc.*, 127 AD3d 964, 965 [2d Dept 2015]). "Foreseeability does not define the duty, but merely defines the scope of the duty, once it is determined to exist" (*Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 18 [2d Dept 2019] [internal citations omitted]).

"The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is of course a question of law for the courts" (*Purdy v Pub. Adm'r of Westchester County*, 72 NY2d 1, 8 [1988], *rearg denied* 72 NY2d 953 [1988]). Courts traditionally "fix the duty point by balancing factors, including the

reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 586 [1994]).

"A property owner, or one in possession or control of property, has a duty to take reasonable measures to control the foreseeable conduct of third parties on the property to prevent them from intentionally harming or creating an unreasonable risk of harm to others" (*Jean v Wright*, 82 AD3d 1163, 1163-1164 [2d Dept 2011] [citations and internal quotations omitted]). This duty, however, only arises when there is an ability and opportunity to control such conduct, and an awareness of the need to do so (*Jaume v Ry Mgt. Co.*, 2 AD3d 590, 591 [2d Dept 2003]). "A property owner cannot be held to a duty to take protective measures unless it is shown that he either knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor" (*Jean v Wright*, 82 AD3d at 1164).

Here, the court finds that Torath owes no duty to plaintiff. On the day of the accident, Jerusalem Valet was stationed outside the doors of Torath's synagogue to park the cars of the guests attending the Dweck wedding. While Torath had a duty to take reasonable measures to control the foreseeable conduct of Jerusalem Valet while it was stationed on its property, Torath's duty, as a property owner, did not extend to the site of plaintiff's accident, which occurred four blocks away from its property. The undisputed facts of this case indicate that Torath merely provided a venue for the Dweck wedding

and did not contract with Jerusalem Valet, direct, control, or supervise the valet drivers in any way. Even if Torath had the ability to control the conduct of Jerusalem Valet while on its premises, it did not have the opportunity to control the conduct of Jerusalem Valet's drivers after they drove cars away from its property (*see e.g., Aupperlee v Rest. Depot, LLC*, 177 AD3d 940, 942 [2d Dept 2019], *lv denied*, 35 NY3d 902 [2020]; *Rodriguez v Judge*, 132 AD3d 966, 969 [2d Dept 2015]. The evidence in this case also reveals that Torath had no prior experience with Jerusalem Valet, received no complaints about Jerusalem Valet, and that there were no incidents with any other valet companies operating at its premises that suggested that there was a likelihood of any conduct on the part of the valet service that would endanger anyone on its property or nearby.

In support of their arguments in opposition, plaintiff and Shalom rely on *Spadaro v Parking Systems Plus, Inc.* (113 AD3d 833, 834 [2d Dept 2014]), in which the Second Department held that a restaurant that provided valet services to its customers could be held liable for the actions of the valet and parking services companies that operated out of its premises, even where the restaurant contracted with an independent contractor that employed the valet parking attendants. The facts of this case differ significantly from the facts in *Spadaro*.

In *Spadaro*, the restaurant offered valet services as part of its business and contracted with the valet company involved in the accident. Here, Torath did not offer valet services as a part of its business and it had no contract with, or connection to, Jerusalem Valet which was hired by the Dwecks. In *Spadaro*, the defendant restaurant

had its own parking lot where the valet company parked the cars of its customers. This provided the restaurant with far greater control than Torath had over the conduct of the Jerusalem Valet drivers. The restaurant in *Spadaro* instructed valet drivers on where to park cars and permitted them to double park on the street in front of the restaurant, which the court found could potentially have been a factor in causing the accident. In contrast to *Spadaro*, Torath does not have a parking lot on its property, and therefore did not have any control over where and how valet drivers parked the cars entrusted to them. The plaintiff in *Spadaro* alleged that the restaurant supervised and controlled the manner and methods of the valet drivers whereas here there is no such allegation or any evidence to suggest Torath directed the valet drivers.

Additionally, plaintiff and Shalom cite *Berger v Rokeach* (58 Misc.3d 827 [Sup. Ct. Kings Cty. 2017]), in which the trial court held that a supermarket, which subcontracted the valet services they offered to an independent contractor, could be held liable for the negligence of the valet company, and its driver. In that case, the court found that the supermarket had a duty to "exercise reasonable care in maintaining its properties in a reasonably safe condition and to have taken reasonable measures to control the foreseeable conduct of parties on the property with whom they contracted, that is, the parking attendants, to prevent them from either intentionally harming or creating an unreasonable risk of harm to others" (*Id.* at 842). The court found that the duty arises, "when there is an ability and opportunity to control the conduct of its contractors, and an awareness of the need to do so" (*Id.*). The court reasoned that the defendant was

"obligated to exercise due care in the "execution of the contract," which, here, refers to selecting a company with, at the minimum, both appropriate insurance and competent drivers" (*Id.*). *Berger* is distinguishable from the instant matter as Torath did not select Jerusalem Valet or enter into a contract with the company. Although Torath provided the Dwecks with a list of valet companies with which it was familiar, it is undisputed that the Dwecks are the ones who selected Jerusalem Valet and entered into a contract with it to provide valet services to their wedding guests.

In addition, plaintiff's contention that Torath bears some responsibility for Jerusalem Valet's negligence because it "approved" of the valet company, lacks merit. Upon review of the record, there is no evidence of approval beyond Torath requiring that Jerusalem Valet provide a certificate of insurance before operating on Torath's property. There is no evidence that Torath was involved in the Dwecks' decision-making process or that it endorsed Jerusalem Valet in any way.

Plaintiff and Shalom's argument that Cohen was underage and not competent to drive at the time of the accident, and that Torath, at a minimum, had a duty to ensure that Jerusalem Valet's drivers were of legal age and competent to drive, is predicated entirely on speculation. Although Mr. Shalom testified that the Jerusalem Valet drivers looked very young, he admitted that he had no knowledge as to their ages or whether they had driver's licenses. He further testified that he never saw Cohen so there is no basis to contend that Cohen was not of legal age or otherwise competent to drive. Furthermore, even if it could be determined that Cohen was underage and thus incompetent to drive, it

was not foreseeable to Torath that Jerusalem Valet would violate state law by employing underaged valet drivers and conceal same by providing Torath with a fraudulent certificate of insurance.

Torath has made a prima facie showing of entitlement to judgment as a matter of law. Without a finding of a duty, there can be no breach or causation, and therefore Torath bears no liability for plaintiff's injuries (*see Zhili Wang*, 127 AD3d at 965). In opposition, plaintiff fails to raise a genuine question of material fact that would preclude the grant of summary judgment. Accordingly, Torath's motion for summary judgment against plaintiff is granted and plaintiff's complaint is dismissed as against it.

In light of the dismissal of the main action as against Torath, as well as against Shalom[3], Shalom's third-party claims against Torath for contribution and common-law indemnification are dismissed as academic (*Payne v 100 Motor Parkway Assoc.*, LLC, 45 AD3d 550, 554 [2d Dept 2007]; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]). Shalom's third-party claims against Torath for contractual indemnification and breach of contract for failure to procure insurance are also dismissed, as there was no contract between these parties (*Persaud v Bovis Lend Lease, Inc.*, 93 AD3d 831, 833 [2d Dept 2012]).

Conclusion

Accordingly, it is hereby

[3] The court notes that the plaintiff and Shalom entered into a stipulation of discontinuance releasing Shalom from the action, which was filed with the court on December 6, 2022 (*see* Stipulation of Discontinuance, NYSCEF Doc No. 97).

ORDERED that Torath's motion (mot. seq. no. 4) for summary judgment is granted and Shalom's third-party complaint is hereby dismissed as against Torath; and it is further

ORDERED that Torath's motion (mot. seq. no. 5) for summary judgment dismissing plaintiff's complaint is granted and plaintiff's complaint is hereby dismissed as against Torath.

The Court has considered the parties' remaining contentions and finds them to be without merit.

All relief not specifically granted herein has been considered and is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C

Hon. Wavny Toussaint
J.S.C.

KINGS COUNTY CLERK
FILED
2023 FEB 21 AM 9:56