

Orta v Baldor Express Transp. Co LLC

2023 NY Slip Op 31909(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 160419/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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<p>ANGEL ORTA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>BALDOR EXPRESS TRANSPORTATION CO LLC, BALDOR BRIX HOLDING LLC, BALDOR SPECIALTY FOODS MGMNT. INC, BALDOR SPECIALTY FOODS, INC., JAMAL BROWN</p> <p style="text-align: center;">Defendants.</p>	<p>INDEX NO. <u>160419/2017</u></p> <p>MOTION DATE <u>05/12/2023</u></p> <p>MOTION SEQ. NO. <u>005</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168

were read on this motion to/for SUMMARY JUDGMENT.

Defendants' Baldor Express Transportation Co. LLC, Baldor Brix Holding LLC, Baldor Specialty Foods Mgmt. Inc., and Baldor Specialty Foods, Inc. motion for summary judgment is granted. This action is dismissed against defendant Jamal Brown for failure to take proceedings pursuant to CPLR 3215(c).

Background

This case arises out of an alleged assault by defendant Jamal Brown against plaintiff. At the time of the assault, Brown was at work as a delivery driver for co-defendant Baldor Express Transportation Co. LLC. Defendants Baldor Express Transportation Co. LLC, Baldor Brix Holding LLC, Baldor Specialty Foods Mgmt. Inc., and Baldor Specialty Foods, Inc. are collectively referred to as "Baldor." Plaintiff testified that he was at work at Columbia Presbyterian Hospital and was removing recycling from the hospital building. He noticed a friend sitting in her vehicle and approached her to say hello and he was suddenly attacked.

According to plaintiff, Brown stepped out of his delivery truck, began screaming obscenities, and hit plaintiff in his left eye. Plaintiff alleges he did not provoke or speak to Brown prior to the incident and did not know Brown at all. Plaintiff filed a complaint seeking relief from both Brown and Baldor alleging assault, battery, intentional infliction of emotional distress, negligent hiring, and negligent supervision.

Baldor now moves for summary judgment claiming it is free from negligence as it conducted a sufficient background check on Brown and Brown was not acting within the scope of his employment at the time of the assault. Baldor argues it had no notice of any violent propensity of Brown and claims there are no triable issues of fact as to Baldor's negligence leading to the assault. Baldor contends Brown's background check showed he was convicted of several non-violent crimes at least 15 years before the date of the assault, all of which did not trigger any notice to Baldor of Brown's purported propensity to commit violent offenses. Furthermore, Baldor claims that only Baldor Express Transportation Co., LLC employed Brown. It insists that this means the other Baldor entities cannot be held liable under any theory of liability because they were not Brown's employer. Finally, Baldor argues that Brown's actions were a clear departure from the scope of his employment and were committed for personal motives.

In opposition, plaintiff maintains the truck Brown was driving was labeled "Baldor" and Brown was in the process of making a delivery to a client at the time of the assault. Plaintiff argues that these circumstances clearly indicate that Brown was acting within the course of his employment when committing the assault. Plaintiff further contends that the identity of Brown's true employer is unclear because the truck Brown was driving and the background check authorization records only refer to the company as "Baldor" thus potentially implicating the

related Baldor entities. Plaintiff asserts that Brown's behavior was reasonably foreseeable as he was charged and convicted of reckless driving and it was negligent to hire him for driving a vehicle when his record indicated he had a history of reckless driving. Plaintiff maintains he suffers from extreme emotional distress as a result of the assault and argues Baldor is liable on behalf of its employee for his injuries.

In reply, Baldor argues plaintiff failed to submit a statement of material facts and this failure deems Baldor's facts as admitted. Baldor further contends that plaintiff failed to offer evidence that Brown was acting within the scope of his employment at the time of the assault. Baldor maintains there is no strict liability for an employer when an employee assaults an individual. Instead, a party must show that the employee was carrying out the employer's interests. Additionally, Baldor argues it was not put on notice of Brown's propensity for violence via his background check, as his offenses were over 15 years prior to the incident, and any argument that such offenses constitute adequate notice is contrary to New York law. Baldor contends that plaintiff's claims for intentional infliction of emotional distress must be dismissed as the conduct complained of is the same conduct underlying plaintiff's claim for assault and battery.

Discussion

To be entitled to the remedy of 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v. Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“Pursuant to the doctrine, the employer may be held liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment. However, liability will not attach for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business” (*Fernandez v Rustin Inn, Inc.*, 60 AD3d 893, 896, 876 NYS2d 99 [2nd Dept 2009]). Moreover, “[i]n order to recover against an employer for negligent retention of an employee, a plaintiff must show that the employer was on notice of a propensity to commit the alleged acts” (*G.G. v Yonkers Gen. Hosp.*, 50 AD3d 472, 472, 858 NYS2d 11 [1st Dept 2008]).

The motion for summary judgment is granted. Regardless of which Baldor entity is a proper defendant, plaintiff failed to raise a material issue of fact that Baldor had any reason to know of Brown’s possible propensity for violence. In *Ali v State of New York*, a security guard, after discovering his grandmother had passed away, punched a wooden bench while on duty (*Ali*

v State of New York, 115 AD3d 629, 981 NYS2d 555 [2nd Dept 2014]). The wooden bench was situated in front of the plaintiff, falling on him and resulting in his injuries (*id.*). The Appellate Division, Second Department affirmed the lower court's ruling that the guard's employer was not vicariously liable as "the evidence at trial established that the security guard was acting solely for personal motives unrelated to the defendant's business at the time of the incident" (*id.* at 631). Moreover, there was no evidence that the guard's actions were foreseeable (*id.*).

Similarly, a history of reckless driving over a decade ago does not sufficiently notify an employer that its employee could assault a random stranger. Baldor demonstrated that it performed a background check on Brown and there was no history of violence. Plaintiff did not point to any evidence to show that Baldor should have suspected or had reason to believe Brown might attack someone. Ultimately, there is no evidence that Baldor's hiring practices or supervision played a part in Brown's behavior, or that it was in the course of Baldor's business. Nothing about making a delivery is related to an assault. By all indications, the assault was completely random and unpredictable.


The Court also severs and dismisses the action against defendant Brown. As Baldor points out in its moving papers, plaintiff has not taken any steps to secure a default judgment against Brown (NYSCEF Doc. No. 135, n 1). And plaintiff did not address this point in his opposition. Therefore, the Court dismisses the claims against Brown pursuant to CPLR 3215(c) for failure to take proceedings (assuming that plaintiff properly served Brown). Of course, if plaintiff never served defendant Brown, then dismissal is appropriate on that basis as well.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed against BALDOR EXPRESS TRANSPORTATION CO LLC, BALDOR BRIX

HOLDING LLC, BALDOR SPECIALTY FOODS MGMNT. INC, BALDOR SPECIALTY FOODS, INC. and the Clerk is directed to enter judgment in favor of these defendants along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the claims against defendant Brown are severed and dismissed for failure to take proceedings against this defendant pursuant to CPLR 3215(c).

6/6/2023 DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE