SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** 11M

Justice

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LARRY KERR,

Plaintiff,

- v -

MICHAEL GARCIA, 131 EAST 23RD LLC,EAST 23 FO LLC,

Defendant.

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INDEX NO. 155973/2016

MOTION DATE 02/22/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 127, 128, 129, 130, 131, 132, 133, 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

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

This action was initiated to recover damages for injuries allegedly sustained as a result of an assault.[1] Defendants, 131 East 23rd LLC and East 23 FO LLC, (hereinafter "East 23rd") now move for summary judgment to dismiss plaintiff's complaint in its entirety, in the alternative East 23rd seeks an adverse inference charge based on plaintiff's alleged spoliation of evidence. Defendant, Michael Garcia, (hereinafter "Garcia"), opposes the portion of the motion that seeks to dismiss plaintiff's *respondeat superior* claims. Plaintiff opposes the motion in its entirety. For the reasons set forth below, East 23rd's motion for summary judgment is granted.

Background

Defendant Garcia was employed by Abro Management as the superintendent of the building located at 131 East 23rd Street. On March 13, 2016, the date of the alleged assault, defendant Garcia observed a man urinating on the building, the man was not plaintiff. The

[1] The Court would like to thank Craig Supcoff for his assistance in this matter.

unidentified man and Garcia exchanged words and shortly thereafter a physical altercation ensued between plaintiff and Garcia.

Summary Judgment Standard

It is conventional practice that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*153 AD2d 520 [1st Dept 1989]. Further, summary judgment should not be granted where there is any doubt as to the existence of material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 [1980]. The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital,* 68 NY2d 320 [1986]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v Ropog Cab Corp.*153 AD2d 520 [1st Dept 1989].

Respondeat Superior

East 23rd contends that the assault was not in furtherance of its business nor was it a foreseeable conduct resulting from the ordinary performance of defendant Garcia's duties as superintendent.

In opposition, both plaintiff and defendant Garcia contend, that Garcia's testimony that he was acting in defense of the building, creates a question of fact that requires determination by the fact finder. The Court does not agree.

"Under the doctrine of *respondeat superior*, an employer may be held vicariously liable for intentional torts committed by employees acting within the scope of their employment, as

long as those acts were generally foreseeable and a natural incident of the employment" (*Summors v Port Auth. of NY & New Jersey*, 203 AD3d 558, 561 [1st Dept 2022] [internal quotation marks and citations omitted]).

Thus, the law is well established that there cannot be vicarious liability for the intentional tort of an employee when the underlying act is outside of the scope of employment (*see* e.g. *Adams v NY City Tr. Auth.*, 88 NY2d 116, 119 [1996]; *Horvath v L & B Gardens, Inc.*, 89 AD3d 803 [2d Dept 2011]; *Bowman v State*, 10 AD3d 315, 315 [1st Dept 2004]).

Here, the Court finds that no reasonable factfinder can conclude that defendant Garcia's alleged conduct, a physical altercation with an individual, whom it is undisputed is not the individual who urinated on the building, would be a foreseeable occurrence incident to the performance of his duties as superintendent of the subject building. The cases cited by plaintiff are unpersuasive and distinguishable. Specifically, plaintiff relies on *Ramos v Jake Realty Co.*, 21 AD3d 744 [1st Dept 2005], where the First Department held that there was a question of fact with respect to whether the superintendent was acting within the scope of his employment when he assaulted a tenant for videotaping an alleged defective condition the landlords refused to remediate. In *Ramos*, the First Department reasoned that there was no personal motivation for the superintendent to assault the tenant, rather the motivation was to prevent the tenant from collecting evidence, which certainly would have been in the interest of the building's owner.

Here, the assault occurred after defendant Garcia observed the individual urinate on the building, thus unlike the building owners in *Ramos*, who could arguably benefit from the superintendent's attempt to prevent the collection of evidence, there was no arguable benefit to be gained by East 23rd. Garcia's assertions, that he did not violate any policies of his employer, whether not such policies existed, because his conduct was a result of defense of the building and

himself from physical harm. Garcia's argument underscores that his conduct, protecting himself from perceived physical harm, is simply not conduct to be reasonably expected by his employer or conduct that is objectively in furtherance of its business.

Negligent Hiring, Training and Retention

"A cause of action for negligent hiring, training, and/or supervision "requires the employer to answer for a tort committed by an employee against a third person 'when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm.'" *Sandra M.* v. *St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006] *quoting Kirkman by Kirkman* v *Astoria Gen. Hosp.*, 204 AD2d 401, 402 [2d Dept 1994].

Here, defendant East 23rd has established that it neither hired nor retained Garcia with knowledge of his propensity to commit violent acts. Plaintiff fails to raise a triable issue of fact. The record suggests Garcia was a model employee during his tenure as superintendent of the building. Further, contrary to plaintiff's argument, provided without any legal support, East 23rd was not obligated to conduct a background check on Garcia before hiring him. Garcia's single criminal charge before beginning his tenure as superintendent is insufficient to suggest to East 23rd that he had a propensity for committing violent acts, especially in light of the fact that his employer did not receive any complaints regarding any conduct by Garcia, specifically any allegations of verbal or physical altercations.

As to East 23rd's request for an adverse inference charge, based on the Court granting the movant summary judgment this portion of the motion is denied as moot. Accordingly, it is hereby

ORDERED that defendants 131 East 23rd LLC and East 23 FO LLC, motion for summary judgment is granted and the complaint and all cross claims are dismissed as against said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Michael Garcia; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsels for the moving parties shall serve a copy of this 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 mark the court's records to reflect the change in the caption herein; 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 (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

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8/8/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE