

Lowe v De La Cruz

2024 NY Slip Op 34677(U)

September 19, 2024

Supreme Court, Bronx County

Docket Number: Index No. 28984/2018E

Judge: Elizabeth A. Taylor

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

-----X
DARREN LOWE,

Index No. 28984/2018E

Plaintiff,

-against-

RONNY DELEON DE LA CRUZ, GENOVEVA
DE LA CRUZ-FIGUEROA, GENOVEVA DE LA CRUZ-
FIGUEROA d/b/a DE LA CRUZ DELI GROCERY, DE LA
CRUZ DELI GROCERY, "JOHN DOE 1," "JOHN DOE
2," "JOHN DOE 2" d/b/a DE LA CRUZ DELI GROCERY,
and "ABC CORP." d/b/a DE LA CRUZ DELI GROCERY,

Hon. Elizabeth A. Taylor,
Justice Supreme Court

Defendants.

-----X

The following papers were read on these motions (NYSCEF Seq. Nos. 5 and 6):

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Sequence 5 Notice of Motion – Exhibits and Affidavits Annexed	66-70
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Upon the foregoing papers, the above motions for summary judgment are decided in accordance with the annexed decision and order.

Dated: SEP 19 2024

Hon. 
Elizabeth A. Taylor, J.S.C.

1. CHECK ONE.....
2. MOTION IS.....
3. CHECK IF APPROPRIATE.....
- CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 GRANTED DENIED GRANTED IN PART OTHER
 SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

-----X

DARREN LOWE,

Plaintiff,

DECISION and ORDER

Index No. 28984/2018E

-against-

RONNY DELEON DE LA CRUZ, GENOVEVA
DE LA CRUZ-FIGUEROA, GENOVEVA DE LA CRUZ-
FIGUEROA d/b/a DE LA CRUZ DELI GROCERY, DE LA
CRUZ DELI GROCERY, "JOHN DOE 1," "JOHN DOE
2," "JOHN DOE 2" d/b/a DE LA CRUZ DELI GROCERY,
and "ABC CORP." d/b/a DE LA CRUZ DELI GROCERY,
Defendants.

-----X

Elizabeth A. Taylor, J.

In Motion Sequence No. 5, plaintiff moves for an Order pursuant to CPLR 3212 granting summary judgment on liability against the defendant, Ronny Deleon De La Cruz, on the ground that with the prior striking of his answer by Justice Julia I. Rodriguez there are no triable issues as to his liability, and granting summary judgment on liability against the defendant, Genoveva De La Cruz-Figueroa, Genoveva De La Cruz-Figueroa d/b/a De La Cruz Deli Grocery, and the defendant, De La Cruz Deli Grocery, on the ground of respondeat superior for the acts of the defendant, Ronny Deleon De La Cruz. Defendants Genoveva de la Cruz-Figueroa, and Genoveva de la Cruz-Figueroa d/b/a de la Cruz Deli Grocery cross motion for summary judgment pursuant to CPLR §3212 dismissing the complaint against them.

In Motion Sequence No. 6, defendants Genoveva de la Cruz-Figueroa, and Genoveva de la Cruz-Figueroa d/b/a de la Cruz Deli Grocery move pursuant to CPLR §3211(a)(7) to dismiss the complaint on the ground that it fails to state a cause of action, and pursuant to CPLR 3212 for summary judgment dismissing the complaint as to said defendants.

FACTS AND ARGUMENT

Plaintiff alleges that on February 27, 2018, plaintiff was present at defendant Genoveva De La

Cruz' (hereinafter, "GDLC") retail grocery store located at 694 East 141st Street in Bronx County when defendant Ronny DeLeon De La Cruz (hereinafter, "RDDLC"), who was the sole employee on duty at the store, willfully, maliciously, and recklessly assaulted him. Plaintiff states in an affidavit that he did not provoke the assault or initiate any physical contact. Defendant RDDLC came from behind the counter without provocation and slashed plaintiff with what appeared to be a boxcutter.

Defendant RDDLC was arrested and charged in connection with the assault, although ultimately the charges were dismissed. In an Order dated August 11, 2022, Justice Julia I. Rodriguez directed that defendant RDDLC's answer be stricken if he failed to provide a written authorization with 60 days of the Order permitting plaintiff to obtain copies of the sealed criminal records pertaining to the alleged assault on plaintiff. The 60-day deadline under the Order of August 12, 2022, expired on October 11, 2022, that the authorizations were not provided, and that RDDLC's answer was automatically stricken by virtue of the Order of August 11, 2022.

ARGUMENT

Sequence No. 5

Plaintiff now moves for summary judgment in his favor as to liability against the defendants. He argues that a defendant's whose answer is stricken admits all traversable allegations in the complaint, including the basic allegations of liability. Plaintiff therefore contends that defendant RDDLC has admitted that he assaulted the plaintiff, without cause, and is therefore liable as a matter of law.

Plaintiff also seeks summary judgment against defendants GDLC d/b/a De La Cruz Deli Grocery and the defendant, De La Cruz Deli Grocery, on the ground that they are vicariously liable

for the assault upon plaintiff by defendant RDDLC under the doctrine of respondeat superior. An employer, plaintiff argues, is vicariously liable for the acts of its employees under the doctrine of respondeat superior. As the admissions in this case and plaintiff affidavit establish *prima facie* that defendant RDDLC was the only one working in, and oversaw, the De La Cruz Deli Grocery GDLC and De La Cruz Deli Grocery, and as defendant has admitted by his default that he attacked and assaulted plaintiff with a boxcutter or similar blade, plaintiff maintains, the basis for vicarious liability under respondeat superior is established.

Defendants DDLC, and Genoveva de la Cruz-Figueroa d/b/a de la Cruz Deli Grocery oppose plaintiff's motion, and cross motion for summary judgment pursuant to CPLR 3212 dismissing the complaint. They argue that that the granting of a default judgment against one defendant does not preclude the co-defendant from contesting the issue of the plaintiff and co-defendant's negligence. They further argue that 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. In this regard, they submit the affidavit of nonparty Felix De La Cruz, the brother-in-law of the defendant GDLC and a manager of the deli, who states that the defendants had no knowledge of any violent propensities on the part of defendant RDDLC. Further, he states that store employees were not "issued" boxcutters or cutting devices and were not permitted to "carry" any such devices, and further, that RDDLC, who was only a cashier with no supervisory duties, was not acting in furtherance of the deli business or within the scope of his duties at the time of the alleged incident.

In response, plaintiff maintains that the purported lack of knowledge of violent propensities does not absolve the employer, of liability under the doctrine of respondeat superior. Knowledge of violent propensities is only relevant on a claim of negligent hiring or retention. In addition, defendants failed to respond to plaintiff's Statement of Material Facts, which may be deemed an

admission of those facts by the defendants (see 22 NYCRR 202.8-g(c)). Plaintiff further maintains that he has established an entitlement to summary judgment as to liability.

Sequence No. 6

Defendants DDLG and Genoveva de la Cruz-Figueroa d/b/a de la Cruz Deli Grocery argue that the action must be dismissed against them on the grounds that 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. They submit the affidavit of Felix De La Cruz, the brother-in-law of the defendant GDLC, and the affidavit of GDLC. Felix De La Cruz who states that he is the manager of the defendant De La Cruz Deli (Deli) and has firsthand knowledge of the facts and circumstances. He attests that while GDLC "is the sole proprietor ...who occasionally helped in the Deli," the affiant and his brother-in-law, David Ventura (GDLC's husband), ran the deli and hired all the employees and workers. GDLC contends that she was not involved in the day-to-day operation of the deli. The movants contend that "there is no other explanation for Deleon's [RDDLC's] alleged assault other than he was clearly acting outside the scope of his duties and did not further or serve any discernible business purpose of the Defendants necessitating the dismissal of the cause of action for vicarious liability."

In opposition, plaintiff maintains that the affidavits submitted by the defendants are not in proper form in that the affidavits recited, "I am primarily a Spanish language speaker and, with the assistance of a translator, I have read the annexed affirmation in support of the instant application to dismiss this case," but there are no supporting affidavits from the unidentified translator as is required by CPLR 2101(b). In addition, plaintiff argues, the motion must be denied because the defendants did not submit the required Statement of Material Facts.

On the merits, plaintiff argues that because Genoveva De La Cruz admitted that she is the sole proprietor of the store in which Ronny De La Cruz was working, she is liable as the employer, even if she delegated the daily operation to others. Further, plaintiff maintains, the affidavits do not eliminate prima facie triable issues with respect to the allegations in the complaint regarding defendants' liability for the assault based on respondeat superior. The affidavits of Felix De La Cruz and GDLC address only the allegation that the defendants knew or should have known of RDDLC's violent propensities, but do not set forth facts to eliminate triable issues prima facie as to the allegation that RDDLC assaulted plaintiff while acting within the scope of his employment for the defendants.

DISCUSSION

“The 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. Failure to make such prima facie showing requires a denial of the motion.” (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986].) Once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980].)

Statement of Material Facts

Uniform Rule (22 NYCRR) § 202.8-g (e) provides,

“In the event that the proponent of a motion for summary judgment fails to provide a statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may deny the motion without prejudice to renewal upon compliance, or may take such other action as may be just and appropriate. In the event that the opponent of a motion for summary judgment fails to provide any counter statement of undisputed facts though required to do so, the court may order compliance and adjourn the

motion, may, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent's statement to be admitted for purposes of the motion, or may take such other action as may be just and appropriate."

The Court finds that no penalty is required under the existing circumstances. (*Mazzella v. City of New York*, 2023 N.Y. Misc. LEXIS 5666, 2023 NY Slip Op 33273(U) [Sup Ct, NY Co 2023] [omission did not warrant denial of motion or other penalty where there was no prejudice].)

CPLR 2101

CPLR 2101(b) literally states that an affidavit in a foreign language must be accompanied by a certificate of a translator to be admissible.¹ That section does not address the submission of an affidavit in English where the witness does not speak English. The Second Department has held that the trial court should have disregarded a landscaping employee's affidavit that was submitted in opposition to a summary judgment motion in the employee's personal injury action, albeit the affidavit was in English, as it was not accompanied by an affidavit of a qualified translator attesting to the accuracy of the English-language affidavit, as required by N.Y. C.P.L.R. 2101(b). (*Reyes v Arco Wentworth Mgt. Corp.*, 83 A.D.3d 47, 919 N.Y.S.2d 44 [2d Dept. 2011]; see also, *Uy v Hussein*, 186 A.D.3d 1567, 1569-1570, 131 N.Y.S.3d 70, 73 [2d Dept. 2020] [defendant Uber failed to demonstrate the admissibility of co-defendant's English-language affidavit, considering evidence that co-defendant could not read and understand an English-language affidavit].)

The First Department, however, appears to follow a different rule, more in keeping with the literal language of CPLR 2101(b). In this regard, the First Department held, "Plaintiff's

¹ That section provides, "(b) Language. Each paper served or filed shall be in the English language which, where practicable, shall be of ordinary usage. Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate."

supporting affidavit was prepared in English and accordingly complied with CPLR 2101(b). Plaintiff stated that the affidavit had been translated into Spanish and she fully understood and agreed with every statement, and counsel represented that interpreters were available to ensure plaintiff's understanding of the litigation." (Rodriguez v. Tri-Borough Certified Home Care, Ltd., 227 A.D.3d 557, 557, 210 N.Y.S.3d 407, 408 [1st Dept. 2024].)

The Court accordingly holds that the affidavits are admissible.

Striking of co-defendant's answer

The striking of defendant RDDLC's answer renders him liable as a matter of law. This, however, does not prevent the remaining defendants from contesting their liability. (Balanta v. Stanlaine Taxi Corp., 307 A.D.2d 1017, 763 N.Y.S.2d 840 [2d Dept. 2023].)

Respondeat Superior

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, if those acts were "generally foreseeable and a natural incident of the employment" (see *Rivera v State of New York*, 34 NY3d 383, 389, 119 N.Y.S.3d 749, 142 N.E.3d 641 [2019]). "In determining whether an employee acted within the scope of employment for purposes of vicarious liability, [courts] consider, among other factors, 'the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated' (i.e., whether it was foreseeable)" (*Rivera v State of New York*, 34 NY3d at 389-390, quoting *Riviello v Waldron*, 47 NY2d 297, 303, 391 NE2d 1278, 418 NYS2d

300 [1979]).

In *Judith M. v Sisters of Charity Hosp.* (93 N.Y.2d 932, 715 N.E.2d 95, 693 N.Y.S.2d 67 [1999]), in which a hospital patient sued the hospital for a sexual assault allegedly committed by the hospital's employee, the Court stated:

“The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment (*Riviello v Waldron*, 47 N.Y.2d 297, 304, 391 N.E.2d 1278, 418 N.Y.S.2d 300). If, however, an employee 'for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable' (*Jones v Weigand*, 134 A.D. 644, 645, 119 N.Y.S. 441, quoted in *Baker v Allen & Arnink Auto Renting Co.*, 231 N.Y. 8, 13, 131 N.E. 551).”

In that action, the underlying conduct (a sexual assault) was clearly not within the scope of employment as a matter of law.

The First Department has held that “an employer is generally not responsible pursuant to respondeat superior for assaults committed by their employees.” (*Rizzo v. Estate of Polifrone*, 192 A.D.3d 564, 564, 144 N.Y.S.3d 425, 426 [1st Dept. 2021].) Thus, where a maintenance worker attacked the plaintiff, defendant employer could not be held liable for assault and battery by its employee under a theory of respondeat superior, because the altercation with plaintiff could not reasonably be construed as part of the employee's duties as a maintenance worker or as an act in furtherance of defendant's interests. (*Jiraud v Barnes & Noble, Inc.*, 187 A.D.3d 501, 502, 130 N.Y.S.3d 304, 305 [1st Dept. 2020].) Where an employee struck another employee at an office party, 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” (*Milosevic v O'Donnell*, 89 AD3d 628, 629, 934 NYS2d 375 [1st Dept 2011]; see also, *Vicuna v Empire Today, LLC* (a

Northlake, Illinois-based company), 128 A.D.3d 578, 10 N.Y.S.3d 52 [1st Dept. 2015] [where one employee struck another in dispute over work assignment, employer was not responsible under a theory of respondeat superior].)

Here, the plaintiff alleges that the assault by defendant RDDLC was unprovoked. The fact that RDDLC was the sole employee on duty, and thus ostensibly in charge of the store, does not transform his unexplained assault into conduct in furtherance of the employer's business. As in the cases cited above, the altercation with plaintiff could not reasonably be construed as part of the employee's duties as a cashier or store manager, or as an act in furtherance of defendant's interests. While RDDLC, whose answer was stricken, is liable for the assault, the remaining defendants are not, as RDDLC's conduct was not undertaken in furtherance of the employer's business.

Negligent Hiring and Supervision

The cross-moving defendants submitted evidentiary evidence in the form of affidavits which established *prima facie* that they cannot be held liable for negligent supervision of the deli employee in its employ who allegedly attacked and injured plaintiff. The affidavits establish *prima facie* that these defendants had no knowledge of any violent propensities on its employee's part (Jiraud v Barnes & Noble, Inc., 187 A.D.3d 501, 502, 130 N.Y.S.3d 304 [1st Dept. 2020] see Vasquez v Sirkin Realty Corp., 107 AD3d 410, 411, 967 NYS2d 28 [1st Dept 2013]; Yeboah v Snapple, Inc., 286 AD2d 204, 205, 729 NYS2d 32 [1st Dept 2001]). In opposition, plaintiff failed to raise an issue of fact. (See Vicuna v Empire Today, LLC, 128 A.D.3d 578, 578, 10 N.Y.S.3d 52, 53 [1st Dept. 2015] [where an employee physically attacked another employee, employer was entitled to summary judgment dismissing negligent hiring and retention claim because the record contained no evidence that defendant had notice that the employee had engaged in physically violent behavior or had made verbal threats, much less that he had a propensity to do so].)

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion (Motion Sequence No. 5) is granted only to the extent of granting summary judgment on liability against the defendant, Ronny Deleon De La Cruz, and is otherwise denied; and it is further

ORDERED that defendants' cross-motion on Sequence 5 and motion for summary judgment on Motion Sequence No. 6 are granted, and it is further

ORDERED that the Clerk is directed to enter judgment (1) in favor of the plaintiff as to liability only against defendant Ronny Deleon De La Cruz and set the matter down for a trial on damages against this defendant; (2) in favor of defendants Genoveva De La Cruz-Figueroa, Genoveva De La Cruz-Figueroa d/b/a De La Cruz Deli Grocery, and defendant De La Cruz Deli Grocery dismissing all claims against said defendants; and (3) amend the caption accordingly.

This constitutes the decision and order of the Court.

Dated: SEP 19 2024

ENTER:



Hon. Elizabeth A. Taylor, J.S.C.