

Marrero v Lewis Foods of 688 Eighth Ave., Inc.

2012 NY Slip Op 30621(U)

March 7, 2012

Sup Ct, Queens County

Docket Number: 1227/2010

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ROBERT MARRERO,
Plaintiff,

Index
No. 1227 2010

- against -

Motion
Date February 21, 2012

LEWIS FOODS OF 688 EIGHTH AVENUE,
INC., et al.,
Defendants.

Motion
Cal. Nos. 23 & 24

Motion
Seq. Nos. 1 & 2

The following papers numbered 1 to 27 read on this motion by defendant Lewis Foods of 688 Eighth Avenue, Inc. (Lewis Foods), for summary judgment dismissing the complaint and all cross claims and/or for summary judgment in its favor on its cross claim for contractual indemnification from defendant Cannady Security Services, Inc. (Cannady); and by separate notice of motion by Cannady for summary judgment dismissing plaintiff's complaint and all cross claims.

	<u>Papers Numbered</u>
Notices of Motion - Affirmation - Exhibits.....	1-9
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Upon the foregoing papers it is ordered that the motions are consolidated for purposes of disposition and are determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on January 29, 2009, resulting from an assault by a third-party (assailant) which occurred in a McDonald's restaurant located at 688 Eighth Avenue, City and State of

New York. Lewis Foods owns the restaurant and Cannady was hired to provide security services thereat.

Plaintiff testified, in relevant part: that he was waiting on line to order food; that the assailant – who appeared intoxicated – was asking patrons in line (including himself) to buy him chicken nuggets; that he bought the assailant a cheeseburger and brought it to his table and sat back down; that the assailant became “belligerent,” walked toward him, threw the cheeseburger at him, and threw his tray of food in his face; that the assailant lunged toward him and they both began to wrestle, which lasted approximately 30 to 45 seconds; that the assailant then began to leave the restaurant while verbally threatening him; that the assailant exited for approximately 30 to 60 seconds; that he sat back down and the store manager provided him with more food; that he heard the assailant outside the restaurant threatening to kill him; that the assailant rushed back into the restaurant and tackled him a second time; that another wrestling match ensued for approximately one minute; that the assailant then got up and walked outside; and that, shortly thereafter, the police arrived and arrested the assailant. Plaintiff also testified that he noted a security guard stationed at the entrance to the restaurant. After the first altercation, plaintiff saw the guard walking back toward his station. When the assailant returned, the guard remained at the front of the restaurant and did not make any effort to prevent him from entering, nor did the guard ever attempt to prevent the attack.

Brenda K. Bryant (Ms. Bryant) testified on behalf of Lewis Foods as its store manager. She testified to the following, in relevant part: that a security guard was present on the date of the occurrence; that her understanding was that the guard’s role was to ensure that no problems arose in the restaurant; that she was in the back of the store when she heard a commotion, at which point she came to the counter and saw plaintiff and the assailant fighting; that she witnessed the guard breaking up the two men; that she then telephoned the police; that she was only witness to one fight; that she never saw the assailant before that incident; that she did not believe the assailant to be intoxicated but that he appeared to be mad; and that she never witnessed fights in the restaurant before this incident. Ms. Bryant also testified that the guard’s duties included escorting rowdy customers, and those who loiter, out of the restaurant.

Finally, Henry Cannady (Mr. Cannady) testified on Cannady’s behalf as its president. Cannady testified, in relevant part: that Cannady is a full-service security guard service; that there is a written agreement between Cannady and Lewis Foods to protect the latter’s premises only, which involves protection of the “walls, chairs, and doors”; that protection of the premises does not include protection of persons on the premises; that the incident report, which was generated by the guard as a result thereof, was part and parcel of the guard’s duties; that the guard approaching plaintiff and the assailant to “try[] to calm the

situation down” and attempting to intervene (all contained within the guard’s incident report) were within the realm of the guard’s duties; that the guards are not trained in, inter alia, how to intervene in an altercation; and that it is not part of the guard’s duties to “put his hands on anyone” but rather to simply call the police.

Both the security agreement and the incident report are submitted to the court. The agreement, dated December 21, 2006, states that “ ‘Cannady’ will supply one (1) or more uniformed unarmed guards to protect the premises of ‘Lewis Foods, Inc.’ ” The contract further states that “ ‘Cannady’ further agrees to defend at its expense and hold harmless McDonald’s, Lewis Food’s Inc., their officers, employees and affiliates, from any legal actions or claim arising out of the conduct of the security guards furnished by ‘Cannady.’ ” Further, the security guard generated an incident report, in which he states:

“Security Officer Cava Bell was standing by the front door of McDonald’s. I was called by the General Manager named Brenda to the counter regarding two (2) men arguing. A light skinned male was sitting down and eating and a young male was standing about 3 feet from the light skinned male arguing with him. I then approached both men, trying to calm the situation down and asked both men what was the problem. The light skinned man got up and suddenly began to fight while I was talking to them. The light skinned man initiated the fight. I proceeded to try to break up the fight. I escorted the young male outside the restaurant. . . .

“After about 5 minutes later, the young male ran back into McDonald’s and the light skinned male got out of his seat and both started fighting again. At this time I once again tried to intervene in the middle of the fight, but it wasn’t possible. The police came and they helped break up the fight and escorted the young male outside and cuffed him. . . .”

In support of its motion for summary judgment dismissing the complaint, Cannady argues that it had no duty to protect plaintiff against the actions of a third-party assailant and that, even if it did owe plaintiff a duty, the assailant’s attack constituted an intervening event. With respect to the first contention, while the subject security agreement does not contain an express provision that it would protect patrons of McDonald’s from attack by third-parties (*see e.g. Dabbs v Aron Security, Inc.*, 12 AD3d 396 [2004]; *Durham v Beaufort*, 300 AD2d 435 [2002]), there is an issue of fact as to the meaning of the contract and whether same was intended to include plaintiff as a beneficiary thereto (*see e.g. Great Am. Restoration Servs., Inc. v Scottsdale Ins. Co.*, 78 AD3d 773 [2010] [the agreement may be subject to other reasonable interpretations]). The fact that Ms. Bryant testified that she knew the guard to be present in the restaurant to, inter alia, escort rowdy customers out of the store, coupled with

the testimony of plaintiff in which he stated that the guard did nothing of the sort, certainly creates an issue of fact as to the scope of the guard's duties as well as whether the guard adequately performed those duties. Further, while Cannady focuses on the testimony of its witness to the extent that Mr. Cannady stated that the scope of the guard's duties were only to protect the premises and not persons thereat, his later testimony expanded those duties to: (1) intervening in altercations between patrons; and (2) attempting to diffuse confrontations such as the subject one. Yet, though part of the guard's duties, Mr. Cannady testified that the guards were not trained in these matters. To the extent that Cannady argues that intervention was only performed to the extent necessary to protect the premises, this specific contention is unsupported by the record. As a result of these conflicting issues, Cannady has failed to establish, as a matter of law, that it owed plaintiff no duty (*see Kotchina v Luna Park Hous. Corp.*, 27 AD3d 696 [2006]; *cf. Ravner v Autun*, 60 AD3d 1030 [2009]).

Notwithstanding the ambiguity of Cannady's duties under the security agreement, there is an issue of fact as to whether the guard undertook a duty to assist plaintiff and carried out that duty in a negligent manner. While Cannady correctly states that, generally, the criminal acts of third-parties may constitute a superceding cause, this is not the case when the act is within the scope of foreseeable harm (*see e.g. Mays v City of Middletown*, 70 AD3d 900 [2010]; *Fowler v Yonkers Gospel Mission*, 67 AD3d 635 [2009]; *Bryan v Crobar*, 65 AD3d 997 [2009]). For example, if it were indeed part of the guard's duties to escort rowdy patrons out of the restaurant, there is an issue of fact as to whether the guard failed to do so, based on plaintiff's testimony. Further, the fact that the assailant came in the McDonald's again to assault plaintiff a second time speaks to whether that second attack was foreseeable.

As it cannot be determined on this record whether Cannady has any liability to plaintiff, it follows that Cannady cannot be awarded summary judgment dismissing Lewis Foods' cross claims for, inter alia, indemnification.

Turning now to Lewis Foods' motion, Lewis Foods contends that it had no duty to protect plaintiff from the assailant since the attack could not have reasonably been anticipated or expected. In any event, Lewis Food points to a written agreement between itself and Cannady, wherein Cannady agreed to defend and indemnify Lewis Foods from any legal action or claim arising out of the conduct of the security guards furnished by Cannady.

As to the first point, [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' " (*Kaplan v Roberts*, 91 AD3d 827 [2012], quoting *Hillen v Queens Long Is. Med. Group, P.C.*, 57 AD3d 946 [2008]; *Jean v Wright*, 82 AD3d 1163 [2011]). The duty

arises only when there is an ability and opportunity to control the conduct and an awareness of the need to do so (*see Kaplan*, 91 AD3d at 827; *Jean*, 82 AD3d at 1163-1164).

Here, Lewis Foods has not established its entitlement to judgment as a matter of law. While Ms. Bryant testified that there had never – prior to this incident – been physical altercations between patrons, there is an issue of fact as to whether the occurrence was foreseeable and expected (*see e.g. Rishty v DOM, Inc.*, 67 AD3d 662 [2009]). Plaintiff testified that the assailant was belligerent, appeared drunk, and was permitted to ask several patrons for food and remain in the store prior to the first altercation. Even if it were unforeseeable that the assailant would attack plaintiff based on the circumstances surrounding the first assault, there is an issue of fact as to whether Lewis Foods was negligent in allowing the assailant to return to the restaurant a second time after having attacked and threatened plaintiff just minutes before. Further, as discussed above, there is an issue as to whether Lewis Foods contracted with a security service which carried out its duties negligently.

Finally, as there is an issue as to the scope of Cannady's contractual obligation, Lewis Foods has not demonstrated, as a matter of law, that it is entitled to, *inter alia*, indemnification herein.

Accordingly, the separate motions by Lewis Foods and Cannady are, respectively, denied.

Dated: March 7, 2012

J.S.C.