

Aiello v Burns Intl. Sec. Servs. Corp.

2012 NY Slip Op 31956(U)

July 17, 2012

Supreme Court, New York County

Docket Number: 117442/08

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C.
Justice

PART 57

Index Number : 117442/2008
AIELLO, RACHEL
vs.
BURNS INTERNATIONAL SECURITY
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____


The following papers, numbered 1 to _____, were read on this ^{Burns} motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1, 1a, 2
Answering Affidavits — Exhibits _____ No(s) 3, 4
Replying Affidavits _____ No(s) 5, 6

Upon the foregoing papers, it is ordered that this motion is *decided as per*
accompanying decision/order dated 7-17-12

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
JUL 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-17-12


_____, J.S.C.

MARCY S. FRIEDMAN, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

RACHEL AIELLO, Individually, and as
Administratrix of the Estate of JASON JOHN
AIELLO, deceased

Index No.: 117442/08

Plaintiff(s),

- against -

DECISION/ORDER

BURNS INTERNATIONAL SECURITY
SERVICES CORP., et al.,

FILED

JUL 23 2012

Defendant(s).

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, Rachel Aiello seeks damages for the death of her husband, Jason Aiello, who died in a shoot-out with police after he eloped (i.e., escaped) from a psychiatric unit at the Bayley Seton Hospital, a facility operated by Richmond University Medical Center (RUMC). Defendant Securitas Security Services USA, sued as Burns International Security Services Corporation (Burns), moves for summary judgment dismissing the complaint and the cross-claims of the various hospital defendants (collectively, the RUMC defendants) against it.

The complaint alleges a cause of action, among others, against Burns for negligence. Burns contends that the complaint must be dismissed on the ground that plaintiff's decedent was not a third-party beneficiary of Burns' contract with RUMC to provide security services at the facility.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b].)” (Zuckerman, 49 NY2d at 562.)

It is further settled that an injured party may not recover as a third-party beneficiary of a contract unless it “clearly appear[s] from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary. . . .” (Bernal v Pinkerton’s, Inc., 52 AD2d 760 [1st Dept 1976], affd for reasons stated below 41 NY2d 938 [1977]; see e.g. Gonzalez v National Corp. for Hous. Partnerships, 255 AD2d 151 [1st Dept 1998], lv denied 93 NY2d 812 [1999]; Dabbs v Aron Sec., Inc., 12 AD3d 396 [2d Dept 2004].)

The written contract between Burns and RUMC states that Burns “will provide services pursuant to this Agreement in accordance with mutually-acceptable, written security officer, patrol officer or alarm response orders (which are incorporated into this Agreement by this reference).” (Terms & Conditions, ¶ 1.) It is undisputed that no written orders were made at or before plaintiff’s decedent’s elopement from the RUMC facility. The RUMC defendants and plaintiff take the position that the written contract is therefore an unenforceable agreement to agree.

The court need not, however, reach the issue of the enforceability of the written contract.

Whether the contract was written or oral, there is no evidence in the record that fully details the scope of Burns' responsibilities for security. Nevertheless, it is undisputed that the Burns did not wholly displace the RUMC defendants' responsibility to provide security. Thus, for example, Vincent Forgione, RUMC's Assistant Vice-President of Facilities at the time of the incident, testified that his Director of Security, Michael Esposito, had authority to direct Burns security guards regarding their performance. (See Forgione Dep. at 85-86.) Linda Paradiso, RUMC's Director of Nursing, testified that in 2007, when St. Vincent's Hospital announced that it would no longer provide security at the RUMC facility, Burns was hired to perform security. She worked with Forgione in determining the needs of her programs at the psychiatric unit for security services from Burns. (Paradiso Dep. at 10-14.) She further testified that she terminated Burns' staff if they were not following the rules, and that grounds for termination would be not following the direction of RUMC staff. (*Id.* at 22-23.) Paradiso also testified that RUMC, under her jurisdiction, provides crisis intervention training to all staff, including Burns security. (*Id.* at 23-24.)

On this record, the court finds as a matter of law that Burns did not "entirely displace[]" or "comprehensively absorb[]" RUMC's duty to provide security to protect patients and staff. (Compare Romero v Twin Parks Southeast Houses, Inc., 70 AD3d 484, 486 [1st Dept 2010].)

In Espinal v Melville Snow Contrs., Inc. (98 NY2d 136, 140 [2002]), the Court of Appeals "identif[ied] three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff

detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." (internal citations omitted).

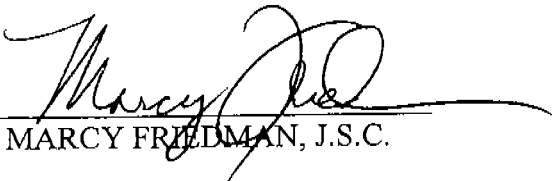
Here, Burns cannot be found to have launched an instrument of harm or, put another way, to have "create[d] or exacerbate[d] a dangerous condition," but at most neglected to make the psychiatric unit safer. (See Church v Callanan Indus., 99 NY2d 104, 111-112 [2002].) Nor does this case fall within the second Espinal situation. Mr. Aiello's wife acknowledges that she "did not know what kind of security system [RUMC] had or whether they had their own security guards or hired an outside security company." (Rachel Aiello Aff. In Opp., ¶ 7.) While she relied on the hospital having security (id.), she did not rely on particular services of Burns. In addition, as held above, Burns did not displace RUMC's responsibilities for security. The court accordingly holds that plaintiffs' complaint should be dismissed as against Burns.

With respect to the RUMC defendants' cross-claims, Burns correctly argues that the claim for contractual indemnification must fail, as the RUMC defendants argue that the written contract, containing the indemnification provision, is unenforceable. The court further finds that to the extent the cross-claims seek common law indemnification or contribution, they must be dismissed, as the RUMC defendants (and plaintiff) have failed to raise a triable issue of fact as to whether plaintiff was a third-party beneficiary of Burns' contract or whether Burns had an independent duty of care to plaintiff.

It is accordingly hereby ORDERED that Burns' motion is granted to the extent of dismissing the complaint and the RUMC defendants' cross-claims in their entirety as against Burns.

This constitutes the decision and order of the court.

Dated: New York, New York
July 17, 2012


MARCY FRIEDMAN, J.S.C.

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