SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MARK SALEM,

Plaintiff,

INDEX NO. 150418/11

-against-

MACDOUGAL REST. INC., d/b/a OFF THE WAGON, TRIMEL A. ROBERTS and THE CITY OF NEW YORK

Defendants.

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JOAN A. MADDEN, J.:

Defendant MacDougal Rest. Inc. d/b/a Off the Wagon ("MacDougal" or "defendant") moves for summary judgment dismissing the complaint and plaintiff opposes.[1]

This is an action to recover damages for personal injuries. Plaintiff alleges that on November 7, 2010, he was assaulted by defendant Trimel A. Roberts, a bouncer/security guard, employed by Off the Wagon, a bar owned and operated by defendant MacDougal, which is located at 109 MacDougal Street in Manhattan (the "bar"). Roberts and another bouncer/security guard, non-party Raul Otero, were stationed at the front door of the bar and denied plaintiff entrance due to his alleged intoxication. An argument ensued and plaintiff was apparently abusive, and tried to enter the bar but Otero pushed him away. Plaintiff then grabbed Roberts'

[1]By order dated February 8, 2013, plaintiff's motion for a default judgment against defendant Trimel A. Roberts was granted, based on his failure to appear and answer. Pursuant to a stipulation filed August 17, 2013, the action was discontinued as against defendant The City of New York.

baseball cap off his head and Roberts immediately chased after and caught plaintiff in front of the bar next to Off the Wagon, Grisly Pear, located at 107 MacDougal Street. Roberts picked up plaintiff from behind, lifted him off the ground, and slammed him down onto the ground, rendering him unconscious. Roberts removed his baseball cap from plaintiff's hand, placed it on his head and returned to the front entrance of Off the Wagon.[2] As a result of the assault, plaintiff suffered serious injuries including a fractured skull and required emergency brain surgery.

In support of its motion for summary judgment, defendant MacDougal argues the amended complaint fails to allege sufficient facts to support a claim based on respondeat superior so as to hold it liable for the assault committed by its employee Roberts. Alternatively, MacDougal argues that plaintiff cannot assert a claim based on vicarious liability as Roberts assaulted plaintiff outside the scope of his employment, in disregard of the bar's "hands off" policy, and in furtherance of his own personal motives in chasing after plaintiff to retrieve his baseball cap. MacDougal also argues that the assault did not occur on or in front of Off the Wagon, but in front of Grisly Pear, the bar next door, and that plaintiff was not a patron of Off the Wagon. MacDougal additionally argues that plaintiff cannot maintain a claim for negligent hiring, supervision and training against an employer if the employee was acting within the scope of his employment, and that there is no evidence MacDougal knew or should have known of Roberts' propensity for the sort of conduct responsible for plaintiff's injuries.

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[2]Defendant MacDougal submits a CD of the surveillance videotape of the front entrance of Off the Wagon, and a separate CD of the surveillance videotape of the front entrance of Grizzly Pear. The Off the Wagon video shows the events leading up to the assault, including plaintiff's taking Roberts' baseball hat. The Grisly Pear video shows Roberts attacking plaintiff from behind, lifting him up and throwing him onto the sidewalk, and plaintiff laying on the sidewalk motionless.

In opposition, plaintiff argues that issues of fact exist as to whether Roberts was acting within the scope of his employment, and whether MacDougal negligently hired, retained and supervised Roberts.

To succeed on a motion for summary judgment, the proponent "must made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case." Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once that proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that a material issue of fact exists which requires a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Under the doctrine of respondeat superior, employers are vicariously liable for their employees' torts, including intentional torts such as the assault in the instant action, if the employee was acting within the scope of his employment and the acts were committed in furtherance of the employer's business. See Riviello v. Waldron, 47 NY2d 297, 304 (1979); Fauntleroy v. EMM Group Holdings LLC, 133 AD3d 452, 453 (1st Dept 2015); Bilias v. Gaslight, Inc, 100 AD3d 533 (1st Dept 2012); Ramos v. Jake Realty Co, 21 AD3d 744 (1st Dept 2005). Respondeat superior "is premised on a notion that the employer 'is justly held responsible when the servant through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." Id at 745 (quoting DeWald v. Seidenberg, 297 NY 335, 338 [1948]); accord Sims v. Bergamo, 3 NY2d 531, 535 (1957). "[T]he employer need not have foreseen the precise act or the exact manner of the injury

as long as the general type of conduct may have been reasonably expected." Riviello v. Waldron, supra at 304. Although "clearly intended to cover an act undertaken at the explicit direction of the employer, . . . it also encompasses the far more elastic idea of liability for 'any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act.'" Id at 303 (quoting 2 Mechem, Agency [2d ed], §189, p 1461).

The applicability of respondeat superior is determined by weighing certain factors, including "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." Id at 303; accord Ramos v. Jake Realty Co, supra at 745. And, since the determination of whether a particular act was within an employee's scope of employment "is so heavily dependent on factual considerations, the question is ordinarily one for the jury." Riviello v. Waldron, supra at 303; accord White v. Alkoutayni, 18 AD3d 540, 541 (2nd Dept 2005).

Here, contrary to MacDougal's argument, a fair reading of both the amended complaint and the bill of particulars, shows that plaintiff alleges sufficient facts to support a cause of action against McDougal based on respondeat superior. See Kerzhner v. G4S Government Solutions, Inc, 138 AD3d 564 (1st Dept 2016) (holding that pleadings may be amplified in the bill of particulars). The amended complaint alleges that MacDougal employed security guards including defendant Roberts; that Roberts "while in the course of his employment" assaulted plaintiff and "negligently and recklessly caused the plaintiff grievous injuries"; and that

MacDougal "failed to properly supervise defendant Trimel A. Roberts, as a security guard for their bar know as 'Off the Wagon." The verified bill of particulars alleges that Roberts "was in the scope of his employment as he was acting as a security guard/bouncer for the bar known as 'Off the Wagon' and denying plaintiff entry to said establishment at the time of his interaction with plaintiff." The bill of particulars also alleges that MacDougal "failed to properly investigate and hire defendant Trimel A. Roberts, as a security guard/bouncer for their bar known as 'Off the Wagon'" and "failed to properly train and supervise Trimel A. Roberts as a security guard for their bar known as 'Off the Wagon.'" Given these explicit allegations that Roberts was acting in the "scope" and "course" of his employment, it is clear that from the outset of this action, plaintiff intended to rely on the doctrine of respondeat superior as grounds for imposing vicarious liability against MacDougal.

The balance of MacDougal's objections to the respondeat superior claim are not persuasive, as the question of whether Roberts was acting within the scope of his employment as a security guard/bouncer and in furtherance of MacDougal's buisness as a bar, is "so heavily dependent on factual considerations" that it cannot be resolved a matter of law. Riviello v. Waldron, supra at 303. The undisputed record as supported by the surveillance videos, shows the close connection between the time, place and occasion of Roberts' assault, which is a factor that must be considered in determining the applicability of respondeat superior. See id.

Specifically, it is undisputed that at the time of the incident, Roberts was its working for MacDougal as a bouncer/security guard at the front entrance of Off the Wagon, and in that capacity, he encountered plaintiff who was waiting on line with two friends to gain admittance to

the bar. Macdougal's witness, Robert Howard, the general manager of the bar, testified that Roberts and the other security guard/bouncer, Raul Otero, were responsible for keeping order at the outside entrance to the bar, where people were standing on line behind a roped-off area along the side of the building waiting to enter the bar. Howard testified that as each person reached the front of the line, Roberts and Otero were responsible for checking their identification, making sure that anyone perceived as a threat, i.e. violent or intoxicated, was refused entry, and keeping track of the number of patrons entering and existing. It is undisputed that when plaintiff and his friends reached the front of the line, Roberts and Otero permitted the friends to enter, but not plaintiff. According to Otero, plaintiff was "intoxicated and abusive." The Off the Wagon surveillance video shows plaintiff at the front of the line arguing with Roberts and Otero, and then attempting to enter the bar without their permission, but Otero blocks plaintiff with his arm. Plaintiff then grabs the Yankees baseball cap off Roberts' head and Roberts immediately chases after him. The Grisly Pear surveillance video shows Roberts on the sidewalk in front of Grisly Pear, grabbing plaintiff from behind, lifting him up and throwing him down to the ground. Plaintiff is laying face-up and motionless on the sidewalk, and Roberts removes his baseball cap from plaintiff's hand, places it on his head and walks back towards the entrance of Off the Wagon.

MacDougal relies on the fact that the assault did not take place either in or in front of its premises, but in front of Grisly Pear. However, since it is undisputed that Grisly Pear is next to Off the Wagon and that the assault took place a mere ten feet from the entrance to Off the Wagon, it cannot be said as a matter of law that the "site of the attack was so far removed from defendants' premises as to be beyond the area that defendants might have expected their

bouncers to control." Babikian v. Nikki Midtown, LLC, 60 AD3d 470, 472 (1st Dept 2009); accord Billias v. Gaslight, Inc, 2011 WL 5059087 (Sup Ct, NY Co 2011), aff'd 100 AD3d 533 (1st Dept 2012). Notably, the surveillance videos show that less than one minute elapsed between plaintiff's taking of Roberts' baseball cap and Roberts' assault of plaintiff.

MacDougal also argues that the matter became "personal" when plaintiff took Roberts' baseball cap. Vicarious liability "will not attach if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business." White v. Alkoutayni, supra at 541; see Schilt v. New York City Transit Authority, 304 AD2d 189 (1st Dept 2003; Stewartson v. Gristede's Supermarket, Inc, 271 AD2d 324 (1st Dept 2000).

Here, viewing the totality of the circumstances surrounding the parties' interaction, the court cannot conclude as a matter of law that at the time of the assault Roberts was acting *solely* for personal reasons. Roberts' interaction with plaintiff began when he and Otero were performing their duties as security guards/bouncers to maintain order at the entrance to the bar and refused plaintiff entry because he was intoxicated. The interaction progressed and rapidly escalated with Roberts and Otero continuing to maintain order and prevent plaintiff from entering the bar, while plaintiff remained at the entrance, became abusive and argumentative, and attempted to enter the bar, but Otero blocked him from doing so. At that point, plaintiff grabbed Roberts' baseball hat and Roberts immediately chased after plaintiff, grabbed him from behind and assaulted him, just ten feet from the entrance to Off the Wagon. Under these circumstances, issues of fact exist as to whether Roberts "through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the

occasion, [went] beyond the strict line of his duty of authority, and inflict[ed] an unjustifiable injury" on plaintiff. Ramos v. Jake Realty Co, supra at 745.

MacDougal further argues that Roberts acted in disregard of the bar's "hands-off policy" and that plaintiff was not a patron since he was not inside the bar. Even assuming without deciding that MacDougal specifically instructed its security guards/bounces to refrain from physical contact with patrons, that fact alone does not compel the conclusion, as a matter of law, that Roberts was acting beyond the scope of his employment when he assaulted plaintiff. See Jaccarino v. Supermarkets General Corp, 252 AD2d 572 (2nd Dept 1998). Rather, when a business such as the defendant bar hires "security guards or bouncers to maintain order, the physical force used by those bouncers may be within the scope of their employment." Fauntleroy v. EMM Group Holdings, LLC, supra at 453; see Jones v. Hiro Cocktail Lounge, ___ AD3d ___, 2016 WL 3006103 (1st Dept 2016); Babikian v. Nikki Midtown, LLC, supra at 471. Moreover, although plaintiff was not physically inside the bar, it cannot be disputed that Roberts was acting within the scope of his employment as a bouncer/security guard when he was stationed outside at the entrance to the bar for the purpose of maintaining order with respect to the people waiting on line to enter to bar, keeping track of the number of people entering and exiting, and determining whether potential patrons should be permitted to enter by checking their identification and making sure they were not violent or intoxicated.

In view of the foregoing, the issue of whether Roberts was acting in the scope of his employment cannot be resolved as a matter of law. Thus, the branch of MacDougal's motion for summary judgment dismissing the claim based on respondeat superior, is denied.

MacDougal also moves for summary judgment dismissing plaintiff's claim for negligent hiring, retention and supervision. Citing Karoon v. New York City Transit Authority, 241 AD2d 323 (1st Dept 1997), MacDougal argues that when an employee acts within the scope of his or her employment, plaintiff cannot maintain a claim against the employer for negligent hiring or supervision. MacDougal is correct, but that rule does not preclude plaintiff from asserting alternative inconsistent theories of recovery, especially where as here, MacDougal maintains that Roberts was not acting within the scope of his employment. See Kerzhner v. G4S Government Solutions, Inc, supra.

MacDougal additionally argues that plaintiff's claim for negligent hiring, retention and supervision fails as matter of law, since the record is devoid of any evidence that it knew or should have known of Roberts' propensity for violence or assaultive behavior. To support this argument, MacDougal submits Roberts' personnel file and the deposition testimony of Robert Howard, the general manager of the bar.

An essential element of a cause of action for negligent hiring, retention and supervision is that the employer knew or should known of the employee's "propensity for the sort of conduct that caused the injury." Sheila C. Povich, 11 AD3d 120, 129-130 (1st Dept 2004); accord Vicuna v. Empire Today, LLC, 128 AD3d 578 (1st Dept 2015); Ostroy v. Six Square LLC, 100 AD3d 493 (1st Dept 2012). In a negligent hiring and retention action, the negligence of the employer "is direct, not vicarious, and arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee." Sheila C. Povich, supra at 129.

Here, MacDougal has made a sufficient prima facie showing that it had no notice of Roberts' propensity for violence. See Vicuna v. Empire Today, LLC, supra; Gomez v. City of New York, 304 AD2d 374 (1st Dept 2003). Roberts' personnel file contains nothing to indicate that he had any criminal history or was involved in any prior incident of violence at the bar. Moreover, the general manager of the bar, Robert Howard, testified that Roberts had a valid New York State security license and that he was not aware of any prior violent acts by Roberts at the bar.

In opposition, plaintiff fails to submit evidence raising an issue of fact as to whether MacDougal had notice of Roberts' violent propensities. See id. Plaintiff asserts that "uncontradicted testimony" shows that Otero, the other security guard/bouncer, knew Roberts had "put his hands on patrons" in the past and violated the bar's "hands-off policy." That "uncontradicted testimony" consists of a handwritten statement signed and sworn by Otero on October 2, 2013, which in relevant part states: "I worked with Roberts for about a year & a half before this & I never saw him get this violent before. There were other times that he put his hands on people. . . . He's had to escort people out of the bar who would not leave under their free will." At best Otero's statement demonstrates that Roberts "put his hands on people" in the past in performing his duties as a security guard/bouncer, but that fact alone is insufficient to show or even suggest that Roberts had a propensity for committing a violent assault, particularly in view of Otero's explicit statement that he "never saw him get this violent before."

In reply, MacDougal provides an affidavit from Otero admitting that he signed the handwritten statement, but explaining, "I did not write it and it does not use my words. I signed it on the advice of an unknown individual who approached me at six o'clock in the morning and I

was not given adequate time to read the document. Having now had the chance to read the document in full, I am providing the present affidavit to clarify several unnecessarily vague and inaccurate statements I have found."[3] He states, *inter alia*, as follows:

> First, the statement in line #11 that "I had never seen him get this violent before" conveys the false impression that I had previously seen Trimel Roberts act violently. In the time I worked with Trimel, I have never seen and have no knowledge of his ever acting violent prior to November 7, 2010. I would never have expected Trimmel to respond to plaintiff's theft of his hat in a violent fashion, and it was massively out of character for Trimel to do what he did. Second, in lines #11-12, it states that "there were other times that he put his hands on people." This is also misleading. Part of our job as security guards for the defendant sometimes entailed having to remove unruly patrons. However, in the training sessions both Trimel and I attended, it was always clear that physically touching a patron was always a last resort to prevent staff or other patrons from being harmed. Also, even if we had to touch a patron, it was understood that any touching would involve the least possible force to prevent harm to others. . . . Lastly, in lines #14-15 it states that Trimmel had previously had to escort people out of the bar who would not voluntarily leave. This does not imply that guards like Trimel and myself saw touching people as part of our job. It simply means that . . . there were times where it was necessary to protect those within the bar by physically removing dangerous individuals.

Thus, since plaintiff has failed to produce evidence that MacDougal had notice that Roberts engaged in physically violent behavior, much less that he had a propensity to do so, MacDougal is entitled to summary judgment dismissing plaintiff's claim for negligent hiring, supervision and training. See Vicuna v. Empire Today, LLC, supra at 578.

Accordingly, it is

ORDERED that the motion by defendant MacDougal Rest. Inc. d/b/a Off the Wagon for summary judgment is granted only to the extent of dismissing plaintiff's claim for negligent

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[3]Notably, plaintiff's opposition papers also include a handwritten sworn statement from Craig Davis, one of the friends with plaintiff on the night of the assault, which appears to be written in the identical handwriting as Otero's statement.

hiring, supervision and training, and in all other respects the motion is denied; and it is further

ORDERED the parties shall proceed directly to mediation.

DATED: June 21, 2016

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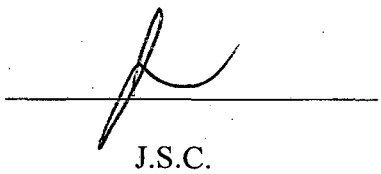

J.S.C.

HON. JOAN A. MADDEN
J.S.C.