| **Niang v NBC Universal Media LLC** |
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| 2017 NY Slip Op 31538(U) |
| July 20, 2017 |
| Supreme Court, New York County |
| Docket Number: 151305/2014 |
| Judge: Kelly A. O'Neill Levy |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. KELLY O'NEILL LEVY** **PART** **19**

*Justice*

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MODOU NIANG,

Plaintiff,

- v -

NBC UNIVERSAL MEDIA LLC, SMASH T.V, JOHN DOES

Defendants.

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**INDEX NO.** 151305/2014

**MOTION DATE**

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this application to/for Summary judgment

**Upon the foregoing documents, it is**

Defendants NBCUniversal Media LLC (s/h/a NBC Universal Media LLC) ("NBCU") and Smash T.V. move for summary judgment in this personal injury matter seeking dismissal of the complaint. The motion is granted as set forth below.

**Facts**

Plaintiff Modou Niang seeks recovery for injuries and economic loss which allegedly arose from an assault on February 15, 2013. On that date, a production team was filming certain scenes for "Smash," a television series which was produced by NBCU, at or near Sixth Avenue and 45th Street in Manhattan. Mr. Niang, a street vendor, was working at his table on the sidewalk of 45th Street between Sixth and Seventh Avenues that day, selling photographs and pictures. He alleged that parking was restricted in the area on the date in question. However, during the filming that day, 45th Street was open to pedestrian and vehicular traffic and the

production's trucks and campers were parked at the curbs. Deposition of *Smash* co-producer and unit production manager Dana Kuznetzkoff, p. 13-15.

Plaintiff alleged during his deposition that while he was seated at his merchandise table that evening, he was approached by a group of four black males, identified only as John Does, who came out of a white trailer. Niang tr. at 39. The largest of the four men had a long beard and was wearing a badge clipped to his jacket. *Id.* at 47-52. He carried a walkie-talkie (*id.* at 98) and approached plaintiff first. The man engaged in a verbal assault on plaintiff, saying, "Africa. N*gger" and "mother f*cker." *Id.* at 35. One of the other men said, "N*gger. You are from Africa, right" and one tried to spit on him. *Id.* at 35. The largest of the men took one of the pictures Mr. Niang was selling off his table and continued cursing at him. Mr. Niang got up from his chair at his table and followed him. As he attempted to pull the picture back, the man pushed him in his chest, causing him to fall backward and break his right wrist. Plaintiff alleges that the assailants were members of defendants' production team.

Plaintiff called 911 while he was on the ground at which time three of the men ran. *Id.* at 72, 75. The assailant walked quickly back to Sixth Avenue and later returned to the scene and covered his face with his jacket. (87-89). Plaintiff was picked up by an ambulance and the police arrived. *Id.* at 85-86. Niang claims he pointed out his assailant to the police and they spoke with him. The police had no further interaction with plaintiff. *Id.* at 93. Plaintiff was treated in the hospital and took painkillers after his injury, but did not spend the night there. Mr. Niang alleges that he is now limited in what he can lift with his right-hand due to a steel replacement for the affected bone. *Id.* at 129.

At his deposition, the responding police officer, Michael Isler, had no independent recollection of the incident and offered only the general notes in his memo book. *Isler tr.*, p.14.

In his memo book, Isler noted that the he responded to a 911 call at approximately 7:00 p.m. for a robbery in progress. *Id.* at 14. The police categorized the incident as a dispute and "non-crime corrected." *Id.* at 16. The officer had no knowledge of interviewing anyone from NBC at the scene and did not recall having seen a film crew there. *Id.* at 27.

**Discussion**

"[T]he '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 eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep't 2010), *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the moving party meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

Plaintiff brought claims for negligent hiring, retention or supervision; personal injury; conscious pain and suffering; intentional infliction of emotional distress; recklessness; vicarious responsibility; and economic loss. Apart from the negligent hiring, retention or supervision claim which is directed at NBCU, none of the claims are directed at a specific defendant. Defendants seek dismissal of the claims against Smash T.V. and NBCU.

***Claims against Smash T.V.***

Defendant argues that the complaint should be dismissed as against Smash T.V. without opposition as Smash T.V. is nonexistent and plaintiff entirely focuses on NBCU. NBCU's Corporate Secretary, Gabriela Kornzweig, states that "NBCUniversal Media, LLC has no past or

current parent, subsidiary or affiliate entity known as "Smash T.V." ... no such company had a corporate relationship with NBCUniversal Media, LLC on February 15, 2013." *Kornzweig Aff* at ¶ 3. Plaintiff does not dispute the nonexistence of Smash T.V. and accordingly, defendant's request to dismiss the complaint as against Smash T.V. is granted.

***Claims against NBCU***

The court considers each of the plaintiff's claims against NBCU in turn.

*Negligent hiring, retention, or supervision*

To recover on a theory of negligent hiring and retention, it must be shown that the employer was aware of the pertinent "tortious propensities" of the employee. *Gomez v. City of N.Y.*, 304 A.D.2d 374 (1st Dep't 2003). Liability for employers attaches "only when the employer knew or should have known of the employee's violent propensities." *Yeboah v. Snapple, Inc.*, 286 A.D.2d 204, 205 (1st Dep't 2001). Employers need not follow certain procedures during the hiring process unless they are aware "of facts that would lead a reasonably prudent person to investigate the prospective employee." *Yildiz v. PJ Food Serv., Inc.*, 82 A.D.3d 971, 972 (2d Dep't 2011).

Defendants argue that they did not hire plaintiff's alleged assailants, and even if they had, they did not know, nor did they have reason to know, of their alleged propensities and plaintiff has not articulated in what way they did not properly hire, retain, or supervise the John Does. Plaintiff argues that defendants should have been aware that their employees were empowered to claim the filming area and prevent any outside interference, and claims that one of the John Does wore a badge.

Dana Kuznetzkoff, a co-producer and unit production manager with the *Smash* show, was present on the night of the incident and testified that she was personally involved in selecting

staff and is at the "center" of the production. Kuznetzkoff tr. p. 10, 6 and 28. Ms. Kuznetzkoff insisted she would know if such an incident had occurred and that no such incident was reported to her or recorded in the daily production report. *Id.* at 20, 28. Kuznetzkoff also claims to have hired people and to be "very particular" in hiring. *Id.* at 10. She stated that the road was not closed and that authorities severely restrict their ability to hold an area for filming and admitted that staff and crew members had been assigned badges. *Id.* at 12-13 and 18.

Kuznetzkoff elaborated in her affidavit that her hiring practices were based on years of experience and that lower level staff where chosen by department heads largely based on prior experience or reputation and that the company would not hire anyone who would behave in the manner described by the plaintiff. Kuznetzkoff "personally oversaw" the department heads who "personally oversaw" the work of their crew. NBCU's sworn statements regarding hiring, retention, and supervision evidence support dismissal of the negligent hiring, retention, and supervision claim and plaintiff fails to present an issue of fact in opposition.

Accordingly, those claims are dismissed.

***Vicarious Liability***

Defendants correctly argue that even if NBCU hired the John Does, vicarious liability under respondeat superior would not be applicable. Vicarious liability requires the act to occur within the scope of employment. *Yeboah v. Snapple, Inc.*, 286 A.D.2d 204, 204-05 (1st Dep't 2001). Here, the alleged assault was clearly not carried out as part of John Does' alleged employment or to further NBCU's business. *Selmani v. City of New York*, 116 A.D.3d 943 (2d Dep't 2014), *Judith M. v. Sisters of Charity Hospital*, 93 N.Y.2d 932, 933 (1999). "[T]he mere fact that the incident occurred at the job site does not compel the conclusion that the assault was within the scope of (the assailant's) duties']), or that his violent act was reasonably foreseeable."

*Troup v. Bovis Lend Lease LMB, Inc.*, 45 Misc. 3d 508, 519 (Sup. Ct., Kings Co. 2014). Where an intentional tort, such as the alleged assault here, is not "condoned, instigated or authorized" and is not within the scope of employment, vicarious liability is inapplicable. *Yeboah*, 286 A.D.2d at 204-05 and *Taylor v. United Parcel Service, Inc.*, 72 A.D.3d 573, 573 (1st Dep't 2010). Accordingly, the vicarious liability claim is dismissed.

***Intentional Infliction of Emotional Distress***

Intentional infliction of emotional distress consists of "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post Co.*, 81 NY2d 115, 121 (1993). Plaintiff bases his claim on the actions of the John Does and alleges that he was made anxious, fearful, and felt degraded. Plaintiff accurately characterizes the alleged conduct as "'so outrageous... in character, and is extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Klein v. Metropolitan Child Services, Inc.*, 100 AD3d 709, 710 (2d Dep't 2014). However, plaintiff aims these allegations at John Does without referencing NBCU, and accordingly the intentional infliction of emotion distress claim fails. *See Herskovitz v. Equinox Holdings, Inc.*, 2013 N.Y. Slip Op. 31193 at *4 (N.Y. Sup. Ct. June 3, 2013). Moreover, as with any intentional tort, an employer cannot be found liable for its employees where their conduct causes intentional infliction of emotional distress, save for when such conduct falls within the scope of the employment which is not the case here. *Elmore v. City of New York*, 15 A.D.3d 334, 335 (2d Dep't 2005), *Herskovitz* at 4.

***Remaining Claims***

Defendants state that plaintiff's cause of action for personal Injury, conscious pain and suffering is not a cognizable claim, and interprets this to refer to a claim that of negligence regarding NBCU's utilization of the area in question for filming which led to plaintiff's injury. Plaintiff consistently asserted that he was pushed, rather than an accident causing his injury. However, plaintiff fails to explain how the filming zone was negligently "used" to result in his accident. Accordingly, this claim is dismissed.

Similarly, plaintiff makes a discrete claim of "recklessness" which fails as a matter of law as recklessness is not a cause of action.

Accordingly, it is

**ORDERED** that the motion by NBCUniversal Media, LLC (s/h/a NBC Universal Media LLC) and Smash T.V. for summary judgment dismissing the complaint against them is granted and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

7/20/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

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| CHECK ONE: | [X] | CASE DISPOSED | | | [ ] | NON-FINAL DISPOSITION | |
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| APPLICATION: | [ ] | SETTLE ORDER | | | [ ] | SUBMIT ORDER | |
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