

Martinez v Amanecer Chapin Corp.

2011 NY Slip Op 32620(U)

October 3, 2011

Supreme Court, Suffolk County

Docket Number: 25616/2008

Judge: William B. Rebolini

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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY**PRESENT:****WILLIAM B. REBOLINI**
Justice

Ottoniel Martinez,

Plaintiff,

-against-

Amanecer Chapin Corporation,
Amanecer Latino, Donald R. Young
and Steven Heurtelou, Mohammed Abdulia
and Shazia Abdulia,

Defendants.

Motion Sequence No.: 004; MOT.DMotion Date: 5/10/11Submitted: 6/15/11Index No.: 25616/2008Attorney for Plaintiff:Cassisi & Cassisi, P.C.
114 Old Country Road, Suite 440
Mineola, NY 11501Attorney for Defendants:Thomas M. Bona, P.C.
123 Main Street
White Plains, NY 10601Clerk of the Court

Upon the following papers numbered 1 to 18 read upon this motion for leave to renew a prior motion for summary judgment: Notice of Motion and supporting papers, 1 - 10; Answering Affidavits and supporting papers, 11 - 15; Replying Affidavits and supporting papers, 16 - 18.

In this action, the plaintiff seeks to recover damages for personal injuries sustained on December 10, 2007 when he was purportedly involved in a physical altercation with defendants Donald R. Young and Steven Heurtelou at premises operated by defendant Amanecer Chapin Corporation (hereinafter "Amanecer") at a bar and/or restaurant known as "Mancer Latino." The premises were owned by Mohammed Abdulia and Shazia Abdulia. At the time of the incident, defendants Young and Heurtelou (hereinafter "the defendant security guards") were working as security guards at the premises. In his complaint, the plaintiff alleges, *inter alia*, that the defendant security guards intentionally assaulted him. He alleges that defendant Amanecer is liable for his injuries as a result of its negligence and that of its agents, servants and/or employees. He alleges that

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Amanecer was negligent in failing to maintain the premises in a reasonably safe condition; failing to maintain proper order in the bar; failing to prevent employees from assaulting plaintiff in spite of notice that said assault was imminent; allowing the plaintiff to be brutally beaten and assaulted without taking any necessary steps to protect him; hiring security persons with violent and criminal tendencies and backgrounds; and failing and neglecting to properly supervise its employees and other personnel. In its answer, Amanecer denies the allegations of the complaint and asserts cross claims for indemnification against its co-defendants.

A default judgment was granted against defendants Young, Heurtelou, and Mohammed Abudlia, and Shazia Abudlia, based on their failure to appear in this action.

Amanecer previously moved for summary judgment dismissing the complaint asserted against it on the ground that it is not liable for the plaintiff's injuries because the defendant security guards were employed by an independent contractor and, in any event, were acting beyond the scope of their employment in causing injury to the plaintiff. Following receipt of a letter from Amanecer's counsel, indicating that the action was stayed by an Order of Rehabilitation, this Court, by order dated April 1, 2010, denied the motion without prejudice to renewal.

Amanecer now seeks leave to renew its prior motion for summary judgment. Based on the representation of counsel that the stay of this action has been lifted, so much of Amanecer's motion as it seeks leave to renew is granted.

Turning to the merits of Amanecer's motion for summary judgment, 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 (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

As a general rule, a principal is not liable for the wrongful acts of an independent contractor it retains (see, Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 33 AD3d 875 [2nd Dept., 2006]; Kirkman by Kirkman v. Astoria Gen. Hosp., 204 AD2d 401 [2nd Dept 1994]). In contrast, an employer "is vicariously liable for the torts of its employee, even when the employee's actions are intentional, if the actions were done while the employee was acting within the scope of his or her employment" (Kirkman by Kirkman v. Astoria Gen. Hosp., 204 AD2d 401 [2nd Dept 1994]; see, Giambruno v. Crazy Donkey Bar & Grill, 65 AD3d 1190 [2nd Dept., 2009]). The determination of whether a particular act was within the scope of employment is so heavily dependent on factual

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considerations that the question is ordinarily one for the jury (see, White v. Alkoutayni, 18 AD3d 540 [2nd Dept., 2005]).

The evidence submitted by Amanecer failed to establish its *prima facie* entitlement to summary judgment dismissing the complaint as asserted against it on the grounds that it cannot be held liable for the defendant security guards' conduct. In support of the motion for summary judgment, Amanecer relies on the deposition testimony of Virgilio Reyes. As is relevant to this motion, Reyes testified that he is an owner of Amanecer and is the manager of the subject premises. Reyes was present on the night of the incident and observed the physical altercation between the plaintiff and the defendant security guards. According to Reyes, he had an argument with the plaintiff that night, prior to the incident, based on the plaintiff's failure to follow rules regarding the occupancy of the premises bathrooms. He was going to have the plaintiff removed from the premises then, but the plaintiff's friends advised Reyes that they would be leaving shortly. The incident at issue occurred in a small vestibule near the exit, in the area the defendant security guards were stationed. As the plaintiff was exiting the premises, he was holding the door and one of the defendant security guards asked him to close it. After the security guard pulled the door closed, the plaintiff was banging on the door and attempting to open it again. Reyes saw the plaintiff attempt to throw a punch at the security guard and the security guard push at the plaintiff's chest, pushing the plaintiff to the sidewalk outside. After falling, the plaintiff got up and approached the security guard, at which time Reyes observed the security guard punch the plaintiff. According to Reyes, it was the plaintiff that started the fight.

When initially asked if the defendant security guards worked for him, Reyes stated "yes." He, thereafter, stated that the security guards came from a company owned by a person by the name of "Jim." He did not know the name of the company or the owner's last name, but did know the owner's telephone number and he provided such number. According to Reyes, the security company was hired approximately one and one half months prior to the date of the incident. He initially testified that the company was hired after one of his friends referred them and later testified that the owner of the company came into the bar looking for business. Reyes testified that he inquired as to whether the personnel provided were going to be licensed, and was told that they were. When they provided people, he checked to see if they had a license with them. Reyes testified that the security guards were paid in cash, one hundred dollars per night per security guard. He used to give the owner of the company the money, but at the time of the incident he was giving the security guards the money directly. Reyes testified that the defendant security guards had been working at the premises for approximately two weeks but that he did not know their names. Prior to this incident, he never saw the defendant security guards involved in another altercation. According to the plaintiff, he never spoke to the defendant security guards about the incident and neither of these security guards was ever sent back to work at the premises again. Reyes admitted that on the night of the incident, he and the three security guards at the premises were arrested. One security guard was arrested for assault and the other two were arrested for not having a security license.

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Contrary to Amanecer's contention, the evidence submitted fails to demonstrate, as a matter of law, that it cannot be held liable for the defendant security guards conduct because they were independent contractors versus employees of Amanecer (see, White v. Alkoutayni, 18 AD3d 540 [2nd Dept., 2005]; compare, Oliva v. City of New York, 297 AD2d 789 [2nd Dept., 2002]). In this regard, the Court finds that the inconsistent and vague testimony provided by Reyes, with respect to the employment of the defendant security guards, presents an issue of fact to be resolved by the jury (see, generally, Dietzen v. Aldi Inc. (New York), 57 AD3d 1514 [4th Dept., 2008]). In any event, the evidence submitted by the plaintiff, in opposition to Amanecer's motion, raises a triable issue of fact as to whether the defendant security guards were employees of Amanecer.

In opposition to the motion, the plaintiff submits the affidavit of Jean Riboul. Riboul states that the telephone number referred to by Reyes in his deposition as belonging to Jim, in fact, belongs to him. Riboul avers that, prior to the date of the incident, he was employed by Amanecer as a security guard. According to Riboul, Reyes asked him if he knew anyone who could help with security at the premises and he provided Reyes with the names of the defendant security guards, Young and Heurtelou. Riboul states that Amanecer hired these security guards and paid them in cash to work at the premises. Riboul avows that at no time did the subject security guards work for him or any company with which he may be affiliated. Lastly, Riboul states that he was not employed by Amanecer on the date of the incident.

Contrary to the Amanecer's alternative contention, the evidence submitted also fails to demonstrate, as a matter of law, that it cannot be held liable for the defendant security guards conduct because they were acting outside the scope of their employment. The evidence submitted fails to show that the defendant security guards were acting solely for personal motives unrelated to the furtherance of its business when they engaged in the purported physical altercation with the plaintiff (see, Giamb Bruno v. Crazy Donkey Bar & Grill, 65 AD3d 1190 [2nd Dept., 2009]; White v. Alkoutayni, 18 AD3d 540 [2nd Dept., 2005]; compare, Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 33 AD3d 875 [2nd Dept., 2006]; Kirkman by Kirkman v. Astoria Gen. Hosp., 204 AD2d 401 [2nd Dept 1994]).

In addition, Amanecer fails to demonstrate a *prima facie* entitlement to summary judgment dismissing the action against it because it fails to address the different theories under which it can be held liable. In making this motion, Amanecer only addresses its vicarious liability based on the conduct of the defendant security guards, and fails to address its liability as a possessor of realty. "A possessor of realty, either as an owner or as a tenant, is under a duty to exercise reasonable care under the circumstances to maintain the property in a safe condition, including the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable criminal acts of third persons" (Kirkman by Kirkman v. Astoria Gen. Hosp., 204 AD2d 401 [2nd Dept 1994]; see Ayeni v. County of Nassau, 18 AD3d 409 [2nd Dept., 2005]; Taft v. Connell, 285 AD2d 992 [4th Dept., 2001]; Novikova v. Greenbriar Owners Corp., 258 AD2d 149 [2nd Dept., 1999]; Aminov v. East 50th St. Restaurant Corp., 232 AD2d 592 [2nd Dept., 1996]; compare, Candelaria v. Lake & Morningside Props., Inc., 71 AD3d 941 [2nd Dept., 2010]; Giamb Bruno v. Crazy Donkey Bar & Grill,

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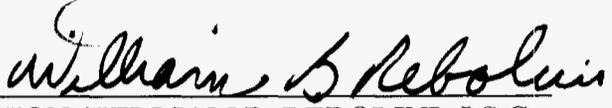
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65 AD3d 1190 [2nd Dept., 2009]). Similarly, Amanecer fails to address its potential liability for negligently hiring the defendant security guards (see, Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 33 AD3d 875 [2nd Dept., 2006]; Oliva v. City of New York, 297 AD2d 789 [2nd Dept., 2002]; Kirkman by Kirkman v. Astoria Gen. Hosp., 204 AD2d 401 [2nd Dept 1994]).

Based on the foregoing, it is

ORDERED that the motion by defendant Amanecer Chapin Corporation for leave to renew its prior motion for summary judgment dismissing the action as asserted against it is granted and, upon renewal, the motion is denied.

Dated: 10/3/2011


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION