

Torres v Reade

2013 NY Slip Op 31525(U)

July 16, 2013

Sup Ct, New York County

Docket Number: 100389/10

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Satnam Scarpulla
Justice

PART 19

Index Number : 100389/2010
TORRES, BLANCHE
vs.
DUANE READE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

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

FILED

JUL 16 2013

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NEW YORK

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Dated: 7/9/13

Satnam Scarpulla, 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: CIVIL TERM: PART 19

-----X
BLANCHE TORRES,

Plaintiff,

Index No.: 100389/10
Submission Date: 4/10/13

- against-

DUANE READE AND "JOHN DOE,"

DECISION AND ORDER

Defendants.

-----X
DUANE READE, A NEW YORK GENERAL
PARTNERSHIP S/H/A DUANE READE,

Third-Party Plaintiff,

- against-

SOTTILE SECURITY SERVICES INC.,

Third-Party Defendant.

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JUL 16 2013

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NEW YORK

-----X
For Third-Party Defendant: For Defendant Duane Reade:
Shay & Maguire LLP Chesney & Nicholas, LLP
950 Franklin Avenue 2305 Grand Avenue
Garden City, NY 11530 Baldwin, NY 11510

Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, third-party defendant Sottile Security Services Inc. ("Sottile") moves for summary judgment dismissing the third-party complaint.

On July 21, 2008, plaintiff Blanche Torres (“Torres”) had just walked out of the Duane Reade Store located at 333 East 102nd Street when she allegedly “was pushed into a anti-theft barrier/scanner striking her back and shoulder areas, struck on the head with metallic handcuffs, slapped on the face and ear(s), had her arms and wrists twisted and was held and restrained with substantial force and not permitted to remain with her infant who remained in a stroller” by a plain-clothes undercover security officer. She commenced this action seeking to recover damages for the injuries she sustained.

Duane Reade then commenced a third-party action against Sottile, which provided security services at the subject Duane Reade location pursuant to a contract. Duane Reade alleged causes of action for contribution and/or common-law indemnification and contractual indemnification. Sottile answered the third-party complaint, denied all material allegations and interposed counterclaims for contribution and indemnification.

At an examination before trial, Torres testified that when she entered the Duane Reade store on the day of the incident, there was a uniformed security guard stationed at the entrance to the store. He was wearing a light blue top and dark blue pants. She was with her sister, her infant nephew and her sister’s friend. Torres testified that the security guard started following them in the store and her sister started arguing and yelling with the security guard. She heard her sister say “we are not stealing, so why are you following us?” Torres showed the security guard that they had money and he said “all you people steal.” Although her sister was still arguing with the uniformed guard, Torres

was “fed up” and attempted to leave the store. She then saw a man in a white T-shirt and jeans trying to lock the door to the store. Torres assumed he was also a security guard because he had keys, he was talking to the uniformed guard, and he showed her a gold badge while saying “I’m security.” She overheard him say “what, they stealing? They stealing? You caught them. You caught them. I’m locking the doors.” The uniformed guard responded, “no, no, not her. Just wait. Just wait.” She pushed her way out of the store using her sister’s stroller before the plain-clothes guard could lock the door. The plain-clothes guard then hit her on the head, and she fell to the ground. He also slapped her face and she fell to the ground again. She testified that the uniformed guard never touched her.

Dotlyn Grant (“Grant”) testified that she was assistant manager at the subject Duane Reade store at the time of the incident. She explained that there was a security guard stationed at the store employed by Sottile who wore a uniform. There was also a loss prevention officer, employed directly by Duane Reade, who would be in the store, and that person would wear street clothes. They would generally not be working at the same time, but sometimes there was overlap. On the day of the incident, the loss prevention officer was Hakeem Small, but she did not know if he was in the store at the time of the incident. The loss prevention officer would not carry any weapons or handcuffs. Grant was not in the store at the time of the incident. According to Grant, the Sottile security guard told her that three women attacked him in the store because he

asked them to give him some items that he saw them try to steal. He told her that they pulled down a chips display and used it to hit him. Grant explained that the security guard and the loss prevention officer do not have keys, rather, only store managers have keys to the store.

Sottile field supervisor Joseph Vigliotti (“Vigliotti”) testified that Clifton Hewitt was the security guard working at Duane Reade on the day of the incident. He explained that Sottile security guards would wear dark pants and collared shirts. Sottile would also employ plain-clothes undercover guards at certain stores. He did not know if there were undercover guards employed at the subject Duane Reade.

Clifton Hewitt (“Hewitt”) testified that he was working as a security guard at the subject Duane Reade on the day of the incident. Three women entered the store, two of whom he recognized because the week before, they had taken sodas and walked out of the store with them. He did not tell the manager about that incident and did not prepare an incident report.

Hewitt testified that at the time of the subject incident, there was a plain-clothes loss prevention officer in the store as well. Hewitt did not know who employed the loss prevention officer. Hewitt was walking around the store making his rounds. When the three women saw him pass by him, they “start to throw words and insults.” The women started throwing items on the floor and in his face, pushing and scratching him, hitting him with a shopping basket, and cursing. He told them to stop and he tried backing away

from them. He then saw the female manager of the store try and lock the door to the store. The three women did not give her a chance to lock the door because they pushed the door open. He did not see the loss prevention officer hit any of the women. The manager called the police, but when they arrived, the women had run away. He prepared an incident report the day after the incident.

Sottile now moves for summary judgment dismissing the third-party complaint. Sottile first argues that Duane Reade is not entitled to contribution or common law indemnification because there is no evidence that Sottile was negligent. Sottile next argues that Duane Reade is not entitled to contractual indemnification because it did not produce a witness to authenticate the contract. In any event, the hold harmless provision in the alleged contract provides that Sottile agrees to indemnify Duane Reade for any claims, losses, damages, expenses or liabilities arising from Sottile's actions except "where such loss injury or damage is directly or indirectly caused by Client or its employee," and here, there is no evidence that any act or omission on Sottile's part contributed to or caused Torres' incident.

In opposition, Duane Reade argues that (1) Sottile already admitted, in response to a July 7, 2011 Notice to Admit, that the subject contract was a true and complete copy of the agreement entered into by the parties; (2) an issue of fact exists as to whether Sottile had a plain-clothes undercover guard employed at the subject store at the time of the incident; and (3) an issue of fact exists as to whether the incident occurred as a result of

any acts or omissions by Sottile, and therefore, whether Duane Reade is entitled to contribution and/or indemnification can not be determined at this time.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

The right to “contractual indemnification depends upon the specific language of the contract.” *Reyes v Post & Broadway, Inc.*, 97 A.D.3d 805, 807 (2nd Dept. 2012). The right to contribution arises when multiple wrongdoers owe a duty to the plaintiff or to the party seeking contribution and, by breaching that duty, they contributed to the plaintiff's personal injury. *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 N.Y.2d 599, 602-603 (1988); *Trump Vill. Section 3, Inc. v. N.Y. State Hous. Fin. Agency*, 307 A.D.2d 891 (1st Dept. 2003). To prove a claim for common law indemnification, a party must show that he or she has been held vicariously liable for the wrongdoing of another. *Structure Tone, Inc. v. Universal Services Group, Ltd.*, 87 A.D.3d 909, 911 (1st Dept. 2011).

The Court finds that Sottile has met its burden of establishing entitlement to summary judgment dismissing the third-party complaint. Sottile provides evidence that Hewitt did not cause or contribute to Torres' alleged injuries. Hewitt testified that he did not hit or assault Torres and Torres testified that the uniformed guard never touched her. There is no other evidence of any act or omission on Sottile's part that caused or contributed to Torres' injuries.

Duane Reade contends that an issue of fact exists as to whether the plain-clothes loss prevention officer -- who Torres alleges did assault her -- was employed by Sottile. However, Hewitt testified that he did not know who employed the plain-clothes loss prevention officer, Vigliotti testified that he did not know if Sottile employed a plain-clothes security guard at the subject Duane Reade store on the date of the accident, and Grant clearly testified that the loss prevention officer working at Duane Reade at the time of the incident was Hakeem Small, who was employed by Duane Reade. This testimony does not create any issues of fact. While there are differing versions of how the incident occurred, none of the versions implicate any Sottile employee as having caused or contributed to Torres' injuries in any way. As such, Sottile can not be held liable to Duane Reade for contribution, common law indemnification or contractual indemnification.

In accordance with the foregoing, it is hereby

ORDERED that third-party defendant Sottile Security Services Inc.'s motion for summary judgment dismissing the third-party complaint is granted, the third-party complaint is dismissed, and the main action is severed and shall continue; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

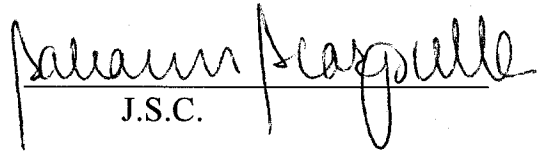
Dated: New York, New York
July 9, 2013

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J.S.C.