SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: [redacted] J.S.C. Justice PART 31

Index Number : 151578/2013
STERK-KIRCH, SUSAN
vs.
TIME WARNER CABLE INC.
SEQUENCE NUMBER : 003
DISMISS

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

In this action for conversion (theft), negligent hiring, and negligent retention arising from a cable installation in plaintiffs' neighbor's apartment, defendant Uptown Communications & Electric, Inc. ("Uptown") moves pursuant to CPLR 3211(a)(7) to dismiss plaintiffs' complaint against it with prejudice.

Plaintiffs Susan Sterk-Kirch and Thomas Kirch ("plaintiffs"), residents at 327 Central Park West, Apt. 10A, allege that on September 8, 2012, defendant Robert Stephens ("Stephens"), an installation technician for Uptown, was dispatched to their neighbor's apartment ("Apartment 10B") to install a Time Warner Cable television box. It is alleged that during the course of the four-hour installation, Stephens left Apartment 10B several times to go downstairs to his service truck, and on the way, broke into plaintiffs' apartment and stole plaintiffs' possessions valued at $90,000. Stephens hid plaintiffs' possessions in bags in his service truck. Stephens was later arrested and some of plaintiffs' possessions were found in his car.

As a result, plaintiffs commenced this action against Uptown, alleging, in their first cause of action, that Uptown is vicariously liabile for Stephens's conversion. It is alleged that Stephens' conversion took place during the course of his employment with Uptown, and "Because employees and agents such as Stephens . . . are necessarily granted entry into apartment buildings, and are granted access to customers' apartments, in order to do their jobs," it was "foreseeable" to Uptown that "such a burglary or conversion could be committed by their employees or agents during the course of cable box installation work." (Complaint, pp. 6-7). The

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

Dated: _____ _____, 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

second cause of action for negligent hiring alleges that "Upon information and belief, prior to being hired by Uptown, Stephens had a criminal record." Uptown hired Stephens notwithstanding its knowledge that Stephens had a propensity for theft based on his criminal record, and took no steps to ensure that he would not steal property while on the job. The third cause of action for negligent supervision alleges that Uptown failed to establish procedures to prevent Stephens from committing burglaries on the job, and failed to supervise him during cable box installations, despite the unusually long time Stephens spent at Apartment 10B.

In support of dismissal, Uptown argues that it cannot be held vicariously liable for Stephen's conversion, an act unrelated to Uptown's business (of installing cable in plaintiffs' neighbor's apartment) and committed solely for his personal motives. There is no allegation that Stephens' job duties required him to enter into plaintiffs' apartment, or that he was given any authorization to do so. Plaintiffs also failed to allege elements for negligent hiring and supervision, in that there is no claim that Uptown had a basis at the time of his hire to suspect a propensity in Stephens to commit unlawful acts.

In opposition, plaintiff argues that under caselaw, Uptown may be held vicariously liable for Stephens' acts even if the tort is not directly related to Stephens' task at hand or committed for his personal gain, since (1) the tort was committed while he was working for the principal, and (2) the type of conduct was foreseeable. It is foreseeable that a cable installer with access to customers' residences might commit a burglary while entering and exiting the customer's apartment and continuing the installation. In further support of their negligent hiring and supervision claims, plaintiffs argue that the Complaint alleges that Stephens had a criminal record before was hired by Uptown, and Uptown knew of such criminal record. Dismissal is premature absent discovery regarding any investigation Uptown undertook prior to hiring Stephens. Additionally, a criminal court complaint and Detective affidavit show that on August 8, 2012, one month before the subject incident, Stephens committed a similar crime during another customer installation, and that a detective spoke to an Uptown employee who confirmed Stephens' identity as its employee during such crime. Yet, Uptown took no steps to properly supervise Stephens to ensure that he did not commit any additional crimes on the job.

In reply, Uptown argues that the Complaint does not allege that Stephens was "doing his master's work" at the time of the conversion, the caselaw plaintiff cites is distinguishable, as Stephens was never authorized by Uptown to have any contact with plaintiffs. And, Uptown did not know of any alleged propensity Stephens had toward criminal behavior either before his hire to during his employment. A criminal background check performed at the time of Stephens' hire showed no criminal history on his part. And, that Time Warner Cable was informed of Stephens' incident on August 8, 2012 does not establish that Uptown was so advised. The criminal complaint and Detective affidavit dated three months after the August 8th incident, with no evidence of a conviction, does not establish that Uptown was on notice of such incident.

Discussion

On a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211 (a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference (*see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not

entitled to such consideration (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]). The court's inquiry is limited to determining whether the complaint states any cause of action, not whether there is evidentiary support for it (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). And, where the parties have submitted evidentiary material, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]).

First Cause of Action

Here, assuming as true the allegations in the Complaint, plaintiffs failed to state a claim against Uptown for vicarious liability for Stephen's alleged conversion of plaintiffs' property. "An employer may be vicariously liable for its employees' tortious acts on a theory of respondeat superior only if they were committed in furtherance of the employer's business and within the scope of employment" (*Bowman v State*, 10 AD3d 315, 316, 781 NYS2d 103 [1st Dept. 2004] *citing Riviello v Waldron*, 47 N.Y.2d 297, 303, 418 NYS2d 300, 391 NE2d 1278). "The doctrine of respondeat superior may be applied 'so long as the tortious conduct is generally foreseeable and a natural incident of the employment'" (*Bowman v State*, 10 AD3d at 316, *citing Judith M. v Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933, 693 NYS2d 67, 715 NE2d 95). "If, however, an employee 'for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable'" (*Bowman v State*, 10 AD3d at 316).

An intentional tort, such as the conversion here, "committed by an employee can result in liability for his or her employer, under respondeat superior if the employee was acting 'within the scope of the employment' at the time of the commission of the tort (*Ramos v Jake Realty Co.*, 21 AD3d 744, 801 NYS2d 566 [1st Dept 2005]). "'[T]he employer need not have foreseen the precise act or manner of the injury as long as the general type of conduct may have been reasonably expected" (*Ramos , supra*). The determination of whether the doctrine applies depends upon,

> "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 the employer could reasonably have anticipated."
>
> (*Ramos , supra*).

"The doctrine is premised upon 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" (*Ramos, supra, citing De Wald v Seidenberg*, 297 N.Y. 335, 338, 79 NE2d 430 [1948]).

Here, even assuming the truth of the claim that Stephens stole plaintiffs' property while on assignment to install a cable box in plaintiffs' neighbor's apartment, no version of the facts give rise to the fact that Stephen's conversion was a departure from his cable installation duties solely for personal motives (*Bowman v State*, 10 AD3d 315, 781 NYS2d 103 [1st Dept 2004]

(stating that "it is clear that the [Court Officer] employee at that time [of the tort] departed from his duties for solely personal motives unrelated to the furtherance of the Court's business" when he raped a private security guard during their lunch breaks in the locker room/cafeteria]). There is no claim that Stephens was assigned to perform any cable installation in plaintiffs' apartment. There is no claim that Stephen's conversion was in the furtherance of Uptown's cable installation business or in furtherance of Uptown's interests. There are no facts indicating that the time, place and occasion of the conversion in plaintiffs' apartment, the history of Stephen's employment relationship with Uptown, or Stephen's act in departing from the assigned apartment to venture off and break into another apartment could have been reasonably anticipated by Uptown. Therefore, the Complaint fails to allege sufficient facts to support a claim against Uptown based on the theory of respondeat superior so as to hold Uptown vicariously liable for the tort committed by Stephens. As such, the first cause of action is dismissed.

Second Cause of Action

An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury (*Sheila C. v Povich,* 11 AD3d 120, 781 NYS2d 342 [1st Dept. 2004] *citing Gomez v City of New York*, 304 AD2d 374, 758 NYS2d 298)).

Here, affording a liberal reading of the Complaint, plaintiff alleged facts indicating that Stephens had a criminal record prior to being hired by Uptown, that Uptown knew of his record, and that Uptown hired him with knowledge of his propensity for theft based on his criminal record, and took no steps to ensure that he would not steal property while on the job. Although Uptown denies such knowledge, in "deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013] ("a motion for dismissal pursuant to CPLR 3211(a)(7) 'must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law'")). Therefore, dismissal of the second cause of action is unwarranted.

Third Cause of Action

As to the third cause of action for negligent supervision, the Complaint, coupled with plaintiffs' submissions, indicate that after Stephens' hire, and before the subject incident, Stephens stole property from the residence of another person during a cable installation at the residence, and that a Detective Nicole Tallour "spoken to an employee of Uptown Communications . . . and that employee has informed [her] that this defendant . . . [was] dispatched to perform service on the above named location [327 Central Park West] on August 8, 2012." Although such statement is dated December 19, 2012, no reference is made in the document as to when Detective Tallour spoke with the Uptown employee. Therefore, the submissions sufficiently support the claim that Uptown knew, or should have known, of Stephens' propensity to commit a theft while performing cable installations.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Uptown Communications & Electric, Inc. pursuant to CPLR 3211(a)(7) to dismiss plaintiffs' complaint against it with prejudice, is granted solely as to the first cause of action, and the first cause of action is severed and dismissed; and it is further

ORDERED that Uptown Communications & Electric, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 15, 2013, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated 9.4.2013 **ENTER:** _____, J.S.C.

CAROL EDMEAD
J.S.C.

Check one: ❑ **FINAL DISPOSITION** ❑ **NON-FINAL DISPOSITION**

Check if appropriate: ❑ **DO NOT POST** ❑ **REFERENCE**