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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Paul Wooten** PART 7

Justice

Index Number : 101639/2007
DOE, JANE
VS.
MADISON THIRD BUILDING
SEQUENCE NUMBER : 003
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 decided in accordance with the memorandum decision in motion sequence 002.

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

Dated: 1/2/14

Paul Wooten 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 ☐

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JANE DOE,

Plaintiff,

- against -

MADISON THIRD BUILDING COMPANIES, LLC, COHEN BROTHERS REALTY CORPORATION, AMERICAN COMMERCIAL SECURITY SERVICES OF NEW YORK, INC., ABM SECURITY SERVICES, INC. and DEWAYNE AFFLICK,

Defendants.

INDEX NO. 101639/07

MOTION SEQ. NO. 002

The following papers were read on this motion by defendants for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ■ Yes ☐ No

Motion sequences 002 and 003 are hereby consolidated for purposes of disposition.

This is a negligence action brought by Jane Doe (plaintiff) for, *inter alia*, negligence, negligent hiring, supervision and training, vicarious liability, and assault and battery against defendants Madison Third Building Companies, LLC, (MTBC) and Cohen Brothers Realty Corporation (CBRC) the owners and manager, respectively of the office building located at 805 Third Avenue, New York (the building), and American Commercial Security Services of New York, Inc. (ACSS) and ABM Security Services, Inc. (ABM) (collectively, ACSS defendants), the companies responsible for security in the building and Dewayne Afflick, (Afflick) a security guard employee of the security companies. Plaintiff's action arises out of injuries she sustained on Monday, July 4, 2005 during a physical assault by a security guard, Dewayne Afflick (Afflick), wherein she was kidnaped and attacked by Afflick in an unlocked, vacant and

accessible floor of the building, wherein he attempted to rape the plaintiff. Afflick was employed by ABM at the time of the accident, and plaintiff was employed as an attorney with the law firm of Vedder Price Kaufman & Kammholz, which maintained offices on three floors of the building. The same day, Afflick was arrested in the building and he was subsequently convicted of kidnaping, attempted rape and assault, and is currently serving a 12 year prison sentence. Plaintiff further proffers that the defendants, by reason of their negligence, are the proximate cause of her attack, kidnaping, assault and attempted rape from which she alleges she continues to suffer numerous physical and psychological injuries that have caused her extensive pain and suffering. Thereafter plaintiff commenced the herein action by the filing of her complaint on or about February 2, 2007. Defendants ACSS, MTBC and CBRC (collectively defendants) interposed their answers. In their answer MTBC and CBRC asserted cross-claims for indemnification against ABS. Discovery in this matter is complete and Note of Issue was filed on October 23, 2012.

Before the Court is a motion by ACSS and ABM for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross-claims asserted against them (motion sequence 002). Also before the Court is a motion by MTBC and CBRC for summary judgment dismissing the complaint and any and all cross-claims asserted against them pursuant to CPLR 3212 or, in the alternative, granting said defendants summary judgment on their cross-claims against Defendants ACSS, ABM, and Afflick (motion sequence 003). Plaintiff brings a cross-motion seeking to amend her complaint to add the claim of negligent hiring regarding an additional security guard, Joseph Rogers. Defendants oppose the motion to amend.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party

moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

Motion Sequence 002

A sexual assault perpetrated by an employee is not in furtherance of the security business and is a clear departure from the scope of employment, because it is clearly perpetrated for the employee's own purposes, and is a departure from service to the employer

(*see RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158 [2004]); *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]). Although an employer cannot be held vicariously liable "for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business" (*Fernandez v Rustic Inn, Inc.*, 60 AD3d 893, 896 [2d Dept 2009]), the employer may be held liable for negligent hiring, supervision, and retention of the employee (*see Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 586 [2d Dept 2006]; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2d Dept 2006]). However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (*see G.G. v Yonkers Gen. Hosp.*, 50 AD3d 472, 472 [1st Dept 2008] ["In order to recover against an employer for negligent retention of an employee, a plaintiff must show that the employer was on notice of a propensity to commit the alleged acts"]; *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243 [1st Dept 2006]; *Gomez v City of New York,* 304 AD2d 374, 374 [1st Dept 2003] ["recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee"]; *Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801 [2d Dept 2010]; *Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006]; *Doe v Rohan*, 17 AD3d 509 [2d Dept 2005] *appeal denied* 6 NY3d 701 [2005]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159,161 [2d Dept 1997] *cert denied* 522 US 967 [1997] *lv dismissed* 91 NY2d 848 [1997]).

In addition, "'there is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee'" (*Jackson*, 69 AD3d at 801-802 [2d Dept 2010), quoting *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2d Dept 2006], quoting *Doe v Whitney*, 8 AD3d 610, 612 [2d Dept 2004]; *T.W. v City of New York*, 286 AD2d 243, 245 [1st Dept 2001] ["An employer has a duty to investigate a prospective employee when it knows of facts that

would lead a reasonably prudent person to investigate that prospective employee"]).

Here, the record is replete of any indication demonstrating that the ACSS defendants were aware of any prior conduct on the part of Afflick that would put them on notice of the foreseeability of such incidents as are alleged here (*see Bowman v State of New York*, 10 AD3d 315 [1st Dept 2004]), which would trigger ACSS' duty to conduct an investigation (*cf. T.W. v City of New York*, 286 AD2d 243 ["A jury could reasonably conclude that [defendant] had a duty to conduct an investigation of [employee's] background given its *actual knowledge* that he had a conviction] [emphasis added]). In opposition, plaintiff failed to submit evidence raising a triable issue of fact as to whether the ACSS defendants had notice of conduct by Afflick demonstrating a propensity for the sexual misconduct alleged against him (*see White*, 35 AD3d at 244; *Gomez,* 304 AD2d at 375; *Mataxas v North Shore Univ. Hosp.*, 211 AD2d 762 [2d Dept 1995]; *cf. G.G.,* 50 AD3d at 472 ["plaintiff raised a triable issue of fact based on the testimony of a nursing aide who had previously reported that the [employee at issue] had offered a patient medication in exchange for sex"]; *see also Nouel v 325 Wadsworth Realty LLC,* –AD3d–, 2013 NY Slip Op 08361 [1st Dept 2013]). Moreover, even if the ACSS defendants had a statutory duty to investigate Afflick's prior employment history pursuant to General Business Law § 89-g, plaintiff would still need to demonstrate that the ACSS defendants had knowledge of his propensity to commit the specific acts alleged herein in order to sustain her claim for negligent hiring, supervision/training, which she fails to do here.

Given defendants' lack of notice, plaintiff's negligence claim based on premises liability must also be dismissed (*see Nouel*, –AD3d–, 2013 NY Slip Op 08361 *1). Accordingly, ACSS and ABM's motion seeking dismissal of the complaint as against them is granted in its entirety. In light of this Court's dismissal of any negligence claims asserted as against ACSS and ABM, the cross-claims asserted against ACCS and ABM for common-law and contractual indemnification are also dismissed. Accordingly, the motion by ACSS and ABM for summary

judgment dismissing the complaint and all cross-claims asserted against them is granted.

Motion Sequence 003

As a threshold matter, the Court will address the timeliness of defendants MTBC and CBRC motions' for summary judgment. Since 1996, CPLR 3212(a) has provided that a motion for summary judgment must be made within 120 days after the Note of Issue has been filed, although the court may order a shorter period of at least 30 days. The deadline may be extended upon a showing of good cause for the delay (*see Miceli v State Farm Mutual Automobile Ins. Co.*, 3 NY3d 725, 726 [2004]). In *Brill v City of New York,* (2 NY3d 648 [2004]), the Court of Appeals held that a satisfactory explanation for the untimeliness in bringing a motion is required for a showing of good cause for the delay.

The Court finds that defendants MTBC and CBRC's motions are untimely pursuant to CPLR 3212. According to the published rules of IAS Part 7, effective June 1, 2011, summary judgment motions are to be made within 60 days of the filing of the Note of Issue. The Note of Issue was filed on October 23, 2012, but plaintiff's motion for summary judgment, while dated December 20, 2012, was filed on January 18, 2013, outside of the 60-day period. In the absence of a showing for good cause for the delay, the Court need not entertain even a meritorious, non-prejudicial motion for summary judgment (*see* CPLR 3212[a]*; Brill v City of New York*, 2 NY3d 640 [2004], *supra*).

Plaintiff's Cross-Motion to Amend the Complaint

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . Leave shall be freely given upon such terms as may be just . . . ." The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should,

of course, be freely given"]). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson*, 24 AD3d at 205; *see Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]." Prejudice to warrant denial of leave to amend requires "'some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position'" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). Plaintiff seeks to amend her complaint to add negligent hiring claims against ACSS and ABM regarding Rogers, the other security guard on duty with Afflick. However, the Court finds that this amendment lacks merit as plaintiff cannot maintain an action against ACSS and ABM for negligent hiring of Rogers. Specifically, plaintiff cannot establish that ACSS and ABM were on notice of Rogers' propensity to commit the acts that plaintiff alleges against him, namely the failure to allegedly follow Post Orders and failing to exercise reasonable care in performing the particular services the guard was employed to perform, thus constituting a breach of the guard's duties (*see G.G.*, 50 AD3d at 472; *White*, 35 AD3d at 243; *Gomez*, 304 AD2d at 374). As such, plaintiff's cross-motion is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants American Commercial Security New York, Inc. and ABM Security Services, Inc.'s motion for summary judgment dismissing the complaint as asserted against them and all cross-claims asserted against them is granted and the causes of action in the complaint and all cross-claims as asserted against them are hereby dismissed; and it is further,

ORDERED that defendants Madison Third Building Companies, LLC and Cohen Brothers Realty Corporation's motions for summary judgment or, in the alternative, granting

said defendants summary judgment on their cross-claims against Defendants American Commercial Security Services of New York, Inc., ABM Security Services, Inc., is denied as untimely; and it is further,

ORDERED that plaintiff's cross-motion for leave to amend the complaint, pursuant to CPLR 3025(b), is denied; and it is further,

ORDERED that counsel for Commercial Security Services of New York, Inc. is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: Jan. 2, 2014

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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