

Reyes v Dave & Buster's Inc.
2016 NY Slip Op 30694(U)
March 10, 2016
Supreme Court, Bronx County
Docket Number: 309436/2008
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA- 24

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XAVIER R. REYES,

Plaintiff(s),

- against -

INDEX NO: 309436/2008

DAVE & BUSTER'S INC., D/B/A
DAVE & BUSTER'S, INC.,
DAVE & BUSTER'S OF NEW YORK D/B/A
DAVE & BUSTER'S, HEIGHTENED SECURITY, INC
and AMIR TELAL a/k/a TELAL AMIR,

DECISION/ORDER

Defendant(s).

-----X

HON. SHARON A.M. AARONS

The motion for summary judgment pursuant to CPLR 3212 is decided as follows:

On November 17, 2007, plaintiff met a friend for dinner in Manhattan. Following dinner, at approximately 10:45 p.m., plaintiff and his friend went to Dave & Busters located on West 42nd Street. While inside Dave & Busters, plaintiff purchased a drink for himself and his friend, and they proceeded to play air hockey. Following this, plaintiff went for a second round of drinks and presented to the bartender an advertisement that had printed on one side a fake \$20 bill. Plaintiff testified that this was obtained in the bathroom of the restaurant they went to earlier that night and that he mistook it for a real \$20 bill. The

bartender indicated to him at the time that the bill was not real tender. Plaintiff proceeded to pay with his debit card.

Shortly thereafter, plaintiff was approached by four security guards who indicated to him that they received a complaint regarding his attempt to pass a fake bill and he was asked to leave the premises. Plaintiff refused to leave. At that point, a Dave & Buster's manager, Sean Palmer, was called over and plaintiff explained to him that he obtained the advertisement in the bathroom. The group proceeded to the bathroom; however, the advertisement was not there. Plaintiff testified that Mr. Palmer then told him he had to leave and directed security to remove him from the premises.

According to plaintiff, one of the security guards then pushed him on his back and shoulder. He then was grabbed on his left wrist and pushed toward a brick wall. Plaintiff allegedly was still holding his drink in a glass that broke against the wall, cutting his hand. Plaintiff further alleged that he was then punched by the security guards in the face, ribs, and back, and pushed into the elevator. When the elevator reached the ground floor, plaintiff was told to leave the premises. While outside, plaintiff called "911" and informed the dispatcher that he had been assaulted.

Plaintiff commenced this action against, among other defendants, the Dave & Buster's defendants. Those defendants seek summary judgment on the ground that the security guards involved in the incident were independent contractors and therefore the Dave & Buster's defendants are not liable to plaintiff

for injuries caused by the guards.

In support of their motion, the Dave & Buster's defendants provide the deposition testimony of Mr. Marhoum, the supervising security guard involved in the incident, who testified that the guards who allegedly assaulted plaintiff were hired by defendant Heightened Security -- not Dave & Busters -- and that Dave & Buster's management did not tell Heightened Security how to perform security work. Further, he testified that the security guards were paid by defendant Heightened Security. This testimony was supported by the testimony of Mr. Campbell, President of Heightened Security.

In opposition to the motion, plaintiff argues that there is a question of fact as to the degree of control exercised by the Dave & Buster's defendants over the Heightened Security guards. Plaintiff argues that the Dave & Busters defendant's evidence (particularly the deposition testimony of Mr. Palmer) demonstrates the existence of a triable issue of fact relating to their control over the work of the security guards. Also, plaintiff cites the deposition testimony of Mr. Palmer, the Dave & Buster's manager, which refers to written documentation as to the security protocol prepared by the Dave & Buster's defendant's legal and corporate department, and provided to security staff.¹

Courts have held that a party who retains an independent contractor, as

¹No document relating to security protocol was exchanged in discovery (a note of issue has been filed in the case), and therefore its putative contents are unknown, leaving the court to speculate as to its potential contents.

distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts. The underlying rationale for the rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor." Kleemann v. Rheingold, 81 NY2d 270, 274 (1993); see Melting v. Puria and Mary 303 AD2d 386 (2d Dept 2003). Thus, control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee. See Colandrino v. Town of Babylon, 95 AD3d 1054 (2d Dept 2012).

Here, the Dave & Buster's defendants failed to make a prima facie showing of entitlement to judgment as a matter of law because their evidence suggests that management at Dave & Buster's exercised more than general supervisory powers" over the guards. Melbourne v. New York Life Insurance Company, 271 AD2d 296 (1st Dept 2000). Specifically, the deposition testimony of Mr. Campbell, President of Heightened Security, sets forth that Dave & Buster's management directed the work of security at Dave & Busters.² Further, the deposition testimony of Mr. Marhoum, the supervising security guard, sets forth that management of Dave & Buster's played an active role in the execution of the

² Exhibit E, of movants' papers (page 24):

"Q. Did anyone from Dave & Busters tell them how to do their jobs...Who directed them?

A. That would be Dave & Buster's management."

security guards' tasks.³ Further, plaintiff's deposition testimony supports these statements; plaintiff testified that management told security the night of the incident, "these guys [i.e., plaintiff and his friend] have to go" after plaintiff stated he was not leaving.

Because the Dave & Buster's defendants failed to establish that, as a matter of law, they did not exercise control over the method and means of the work of the security guards -- the evidence submitted by movants shows that questions of fact exist as to whether Dave & Buster's had a sufficient amount of control over Heightened Security employees so as to direct the work that they performed -- the motion must be denied.

Accordingly, the motion of Dave & Buster's Inc. D/B/A Dave & Buster's Inc., and Dave & Buster's of New York D/B/A Dave & Buster's seeking summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: March 10, 2016



Sharon A.M. Aarons, J.S.C.

³ Exhibit F of movants' papers (page 22):

"Anything happen, the manager will always be there, address the situation and would direct security as to what needs to be done. He decided what he wants to do, and we like Security, we have to do whatever Management wants, we just do. You want a guest out, you say, 'you got to go'."