Silverstein v Fairway Westbury LLC
2016 NY Slip Op 33210(U)
January 15, 2016
Supreme Court, Nassau County
Docket Number: Index No. 601066/14
Judge: Denise L. Sher

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

GLENN SILVERSTEIN,

Plaintiff,

- against -

FAIRWAY WESTBURY LLC and DAVID FRISA,

Defendants.

TRIAL/IAS PART 37
NASSAU COUNTY

Index No.: 601066/14
Motion Seq. No.: 01
Motion Date: 12/09/15

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition, Affidavit and Exhibits	2
Affirmation in Reply and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

This action arises out of an alleged altercation that occurred on April 12, 2013, at the Fairway Market in Westbury, New York, a result of which plaintiff claims to have sustained personal injuries. Prior to the incident, at approximately 9:30 p.m., plaintiff and his wife visited the subject Fairway Market to purchase a quarter-pound of lox and a tomato. Plaintiff had ordered lox at that hour on other occasions. Defendant David Frisa ("Frisa") was the employee responsible for slicing the lox. Defendant Frisa testified that, on the evening of the incident, at

approximately 6:00 p.m., he started to work on a large order of salmon, about thirty-two (32) quarter pounds. Defendant Frisa told plaintiff's wife that he was busy and that she should leave her order, do her shopping and come back after she finished shopping or come back the next day. Words were exchanged between plaintiff and defendant Frisa. After the verbal confrontation, defendant Frisa came from behind the counter to speak to plaintiff. A physical altercation ensued. Plaintiff thought defendant Frisa might be coming toward him with a knife. Defendant Frisa thought the plaintiff to be intoxicated. Plaintiff hit defendant Frisa in the chest. Defendant Frisa pushed plaintiff to the ground.

In support of the instant motion, counsel for defendants submits the deposition transcripts of plaintiff, plaintiff's wife, who corroborates plaintiff's narrative, and defendant Frisa, who validates his narrative. *See* Defendants' Affirmation in Support Exhibits I, L and N. Counsel for defendants also submits the deposition transcript of Matthew Pritchard ("Pritchard"), an assistant manager of the subject store. *See* Defendants' Affirmation in Support Exhibit J. Pritchard testified that he saw plaintiff bumping defendant Frisa and defendant Frisa pushing plaintiff, who got up and went after the plaintiff again. Louis Smith, a deli clerk at the subject store at the time of the incident, testified that he did not witness said incident. *See* Defendants' Affirmation in Support Exhibit K.

In further support of the motion, counsel for defendants submits the transcript of non-party witness Melissa Wozniak ("Wozniak"), who testified that she observed the entire incident. *See* Defendants' Affirmation in Support Exhibit M. When Wozniak was checking out by the cash registers, she saw plaintiff at the front of the store and overheard him talking with someone who looked like a manager explaining how the incident had happened. *See id.* at pp. 23. As Wozniak was walking out of the store, she overheard plaintiff saying that the employee pushed and

attacked him. Wozniak testified as follows:

> "I decided at the last minute that the things that I heard the customer saying were not at all aligning with what I saw when I was standing next to them. So there was a security person standing next to the exit door. So I left my name and number with that person, the security person, because I didn't want the employee to get in trouble because I thought he handled the situation well." *See id.* at pp. 23, 71, 73.

The first cause of action alleges a claim for negligent hiring, training and supervision. Under New York law, a claim for negligent hiring or retention can only proceed against an employer for an employee acting outside the scope of his employment. When an employee is acting within the scope of his employment, the employer is liable for the employee's negligence under a theory of *respondeat superior* and no claim may proceed against the employer for negligent hiring. *See Timothy Mc. v. Beacon City School Dist.*, 127 A.D.3d 826, 7 N.Y.S.3d 348, (2d Dept. 2015). Moreover, under New York law, to state a claim for negligent hiring, training, supervision or retention, "in addition to the standard elements of negligence, a plaintiff must show: (1) that the tortfeasor and the defendant were in an employee-employer relationship; (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and (3) that the tort was committed on the employer's premises or with the employer's chattels." *Ehrens v. Lutheran Church*, 385 F.3d 232 (2d Cir. 2004). "A cause of action for negligent hiring or retention requires allegations that the employer... failed to investigate a prospective employee notwithstanding knowledge of facts that would lead a reasonably prudent person to investigate that prospective employee." *Bouchard v. N.Y. Archdiocese*, 719 F.Supp.2d 255 (S.D.N.Y. 2010). Plaintiff has produced no evidence that defendant Frisa had any propensity for the conduct that caused plaintiff's injuries. Counsel for

plaintiff does not contest this point. Summary judgment is appropriate when there is no proof that defendant Fairway Westbury LLC ("Fairway") acted negligently in hiring, training, supervising or retaining defendant Frisa. The first cause of action as to defendant Fairway's negligent hiring, training and retention claim is therefore **dismissed**. *See Talavera v. Arbit*, 18 A.D.3d 738, 795 N.Y.S.2d 708 (2d Dept. 2005); *Timothy Mc. v. Beacon City School Dist., supra.*

The second cause of action alleges the tort of assault. In order to sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. *See Fugazy v. Corbetta*, 34 A.D.3d 728, 825 N.Y.S.2d 120 (2d Dept. 2006); *Cotter v. Summit Sec. Servs., Inc.*, 14 A.D.3d 475, 788 N.Y.S.2d 153 (2d Dept. 2005).

In the fourth cause of action, plaintiff alleges defendants are liable for behavior of "negligently striking the plaintiff, in negligently causing the plaintiff to be precipitated to the ground; in negligently coming into contact and making contact with the plaintiff; and in otherwise acting in negligent, careless manner." *See* Defendants' Affirmation in Support Exhibit A ¶ 26.

On a motion for summary judgment, the function of the Court is to decide whether there is a material factual issue to be tried, not to resolve it. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611, 514 N.Y.S.2d 107 (2d Dept. 1987); *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dept. 1986). Defendants have not made an adequate *prima facie* show of

entitlement to summary judgment dismissing the second and fourth causes of action.

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000). The court should refrain from making credibility determinations. *See S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004). It is for the trier of facts to weigh the credibility of the conflicting narratives of the incident as set forth in the defendants' submission. Moreover, the papers should be carefully scrutinized in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002). When causation is disputed, as in the within action, where plaintiff says "it happened this way" and defendant says "it happened that way" and one conclusion may not be drawn from the established facts, summary judgment is not appropriate. *See Kirtz v. Schum*, 75 N.Y.2d 25, 550 N.Y.S.2d 584 (1989); *Speller ex rel. Miller v. Sears, Roebuck and Co.*, 100 N.Y.2d 38, 760 N.Y.S.2d 79 (2003). Further, the Court disagrees with defendants' assertion that a certain surveillance video recording, which is submitted in support of the motion, eliminates all triable issues of fact regarding the propriety of defendant Frisa's conduct. Since defendants have failed to make a *prima facie* case on the causes of action sounding in assault (second) and negligence (fourth), the Court need not consider the sufficiency of plaintiff's opposition papers.

Therefore, in summary, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint is hereby **GRANTED with respect to the First Cause of Action** and is hereby **DENIED with respect to the**

remaining Causes of Action.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on January 19, 2016, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 15, 2016