

Scipio v Jimmy Jazz, Inc.

2018 NY Slip Op 34465(U)

January 5, 2018

Supreme Court, Bronx County

Docket Number: Index No. 23049/2013E

Judge: Lizbeth González

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(E)

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Fatima Scipio,

DECISION and ORDER
Index No.: 23049/2013E

Plaintiff,

- against -

Jimmy Jazz, Inc., Jimmy Jazz E-Commerce, LLC and
Ajamu Barry.

Defendants.

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Plaintiff Scipio claims that on 9/12/12 she was on the premises of defendant Jimmy Jazz, Inc. located at 132 West 125th Street in New York County when defendant Ajamu Barry, an employee of Jimmy Jazz, Inc. and Jimmy Jazz E-Commerce (“Jimmy Jazz collectively”), pushed a desk¹ on plaintiff’s leg causing her to fall and sustain serious injuries. Defendants Jimmy Jazz move for summary judgment on liability grounds pursuant to CPLR 3212.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

Defendants Jimmy Jazz maintain that defendant Barry acted outside the scope of his employment. Under New York law, to establish a claim for negligent hiring, retention or supervision, a plaintiff must plausibly allege, in addition to the elements of standard negligence, that “(1) the tortfeasor and the defendant were in an employee-employer relationship, (2) 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” (*Ramos v Jake Realty Co*, 21 AD3d 744 [1st Dept 2005]).

¹ The object that defendant Barry allegedly pushed is interchangeably described by the parties and witnesses as a desk, podium and counter.

In support of their motion, defendants Jimmy Jazz proffer the pleadings and the deposition transcripts of plaintiff, defendant Ajamu Barry, witness Mohammad Naveed and non-party witness Emmanuel Eze.

During her 8/17/15 deposition, plaintiff Scipio testified that she was in the defendants' store to purchase sneakers. An argument ensued when the sales representative told the plaintiff that he did not have the sneakers she wanted in her size. It was at this juncture that defendant Barry walked to the sneaker area and told plaintiff that she was being rude to the sales representative. Ms. Scipio claims that when she walked to the bag check counter to retrieve her personal items from security, Mr. Barry pushed the podium on her leg. Plaintiff testified:

- Q. Now when you stated that the podium was pushed, who pushed the podium?
A. He did.
Q. How did he push it; did he bump it with his body, with one hand, both hands, something else?
A. Both hands.

Defendant Barry testified at his deposition that he is a licensed security guard and worked for Jimmy Jazz for three years. Mr. Barry contends he was monitoring plaintiff while she argued with the sales representative because she wanted a "whole real sock" to try on the sneakers. Plaintiff was near Mr. Barry's security desk and became confrontational. Mr. Barry admits that he "tapped" the desk. He pushed the desk and it fell over toward the plaintiff.

- Q. And what happened?
A. The desk flipped over, well, fell forward.
Q. When you tapped the desk, as you call it, did you tap it with one hand, two hands, or with any other part of your body?
A. It was two hands.
Q. When it fell forward, did it fall toward Ms. Scipio?
A. Yes.
Q. Was she hit by the desk as it fell?
A. No,
Q. Did she fall to the floor?
A. No.

Mohammed Naveed, a Jimmy Jazz regional sales manager, testified at his 8/20/16 deposition that completed employment applications of potential candidates are submitted to

the district store manager (“DSM”) for a potential interview. The office then runs a background check of each candidate. Mr. Naveed states that defendant Barry was hired as a bag checker.

Mr. Naveed further states that Emmanuel Eze, a Jimmy Jazz shoe sales representative and non-party witness, informed him that the plaintiff screamed and yelled at defendant Barry and pushed the counter; Mr. Barry held the counter and pushed the counter back in place; plaintiff moved back; and the counter fell to the floor.

At his 11/16/16 deposition, non-party witness Mr. Eze refuted Mr. Naveed’s hearsay testimony and testified that he did not see the confrontation. Mr. Eze states that he was situated in the back of the store when the confrontation took place. He went to the front of the store when he heard yelling and does not know how the desk fell to the floor.

In opposition to the motion, defendant Barry submits a supplemental discovery response that includes his employment file.² Mr. Barry’s counsel asserts that defendants Jimmy Jazz have failed to prove that they are not liable for Mr. Barry’s actions or inactions as their employee, whether he acted negligently and whether defendants Jimmy Jazz “knew or should have known” that Mr. Barry was allegedly prone to violent behavior.

In opposition to defendants’ motion, plaintiff Scipio incorporates the same arguments and evidence submitted by defendant Barry.

An employer may be vicariously liable for its employee’s negligent or intentional tortious conduct so long as the employees’ acts were committed in furtherance of the employer’s business (*Fautleroy v EMM Group Holdings LLC*, 133 AD3D 452 [1ST Dept 2015]). Under the doctrine of respondeat superior, the factors in determining whether an employee’s conduct, whether negligent or intentional, was sufficiently within the scope of his employment to render his employer liable include:

The connection between the time, place and occasion for the act;
the history of the relationship between the employer and
employee as spelled out in actual practice; whether the act is one
commonly done by such an employee; the extent of departure

²This court’s eRules (<http://www.nycourts.gov/courts/12jd/BRONX/Civil/pdfs/1A-10.pdf>) require the tabbing of all exhibits. Plaintiff’s counsel is cautioned that future submissions that lack proper tabbing will be rejected. A piece of paper between exhibits will not suffice irrespective of its identification of a particular exhibit.

from normal methods of performance; and whether the specific act was one the employer could reasonably have anticipated (*Dykes v McRoberts Protective Agency*, 256 AD2d 2 [1st Dept 1998]).

The parties opposing the Jimmy Jazz summary judgment motion fail to establish that Mr. Barry had a history of or a propensity for, assaultive behavior and, if proven, that the employer knew or should have known of such propensity. Mr. Barry worked at the subject premises for three years without any untoward incident and there is no evidence to demonstrate that defendant Barry's supervision or training was negligent and led to the incident in question. Similarly, there is no evidence that the defendants could have reasonably anticipated Mr. Barry's conduct (*Dykes v McRoberts Protective Agency*, 256 AD2d 2, *supra*). As a result, there is no cause of action for negligent retention, training or supervision (*Detone v Bullit Courier Serv.* 140 AD2d 278 [1st Dept 1988]).

Defendant Barry submits the 11/22/10 Statement of Loss Prevention Responsibilities Employee Dishonest Policy that he signed which defines "workplace abuse" as follows:

Workplace abuse is any illegal, dishonest, irresponsible, or counterproductive act that causes loss or harm to a company, its employees or customers.

Mr. Barry, however, admits that he "tapped" the desk and it fell forward, toward the plaintiff. Significantly, Mr. Barry proffers no evidence to establish that the plaintiff touched him or his security desk, threatened him or caused him to fear for his safety or the safety of others. In the absence of further explanation or any mitigating factor, Mr. Barry's actions cannot be attributed to his employer as conduct in furtherance of Jimmy Jazz's business.

Upon review of the evidence presented, the Court finds that defendants Jimmy Jazz, Inc. and Jimmy Jazz E-Commerce, LLC have met their initial burden and their motion for summary judgment on liability grounds is GRANTED. The opposing parties have failed to meet their shifting burden of proof.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: January 5, 2018

So ordered,


Hon. Lizbeth González, J.S.C.