

Martinez v City of New York

2019 NY Slip Op 33802(U)

December 23, 2019

Supreme Court, New York County

Docket Number: 156586/2014

Judge: Julio Rodriguez III

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

PRESENT: HON. JULIO RODRIGUEZ III PART 62

Justice

-----X

MIGUEL SANTANA MARTINEZ,

Plaintiff,

- v -

CITY OF NEW YORK, VOLUNTEERS OF AMERICA -
GREATER NEW YORK, INC.

Defendant.

INDEX NO. 156586/2014

MOTION DATE 08/01/2019,
08/01/2019

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE

The following e-filed documents, listed by NYSCEF document number (Motion 006) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 140

were read on this motion to/for SUMMARY JUDGMENT

For purposes of disposition, motion sequence numbers 005 and 006 are hereby consolidated.

In motion sequence number 005, defendant The City of New York (City) moves for the following relief: vacatur of the Note of Issue; and/or for an order precluding plaintiff from setting forth any evidence with respect to damages at trial; and/or an order directing plaintiff to comply with the court's January 31, 2019 compliance conference order; and/or an order compelling plaintiff to appear for an independent medical examination. In motion sequence number 006, defendant Volunteers of America-Greater New York, Inc. (Volunteers) moves for summary judgment, dismissing the complaint and all cross claims against it.

This is a personal injury action based on negligent supervision. Plaintiff, a resident of a shelter located at 1 Keener Builder, Ward's Island, New York, alleges that he was viciously assaulted in the first-floor vestibule of the subject premises at approximately 8:30 am on June 8, 2013. Plaintiff alleges that he was assaulted by another resident at or near the entrance to his dormitory. The shelter is operated by Volunteers and owned by the City. Plaintiff is suing these parties for their alleged failure to supervise the premises in a proper manner, said failure leading to his assault and the resultant physical injuries.

Plaintiff filed a summons and complaint on June 24, 2014. Issue was joined on August 22, 2014. Plaintiff served a verified Bill of Particulars dated January 15, 2015. After depositions and

other discovery were conducted, plaintiff filed a Note of Issue and Certificate of Readiness on March 26, 2019.

Motion Sequence Number 005

The City now moves for a vacatur of the Note of Issue on the ground that discovery is incomplete at this time. The City submits a copy of a compliance conference court order, dated January 31, 2019, which required plaintiff to provide updated HIPAA-compliant authorizations to defendants within 30 days of the order and the City to designate an independent medical examination of plaintiff within 45 days thereafter. The City contends that, as of now, plaintiff has not served the City with said authorizations, and that this has prevented the City from designating an independent medical examination. The City argues that if the court does not vacate the Note of Issue, the City will be prejudiced during the trial.

In opposition to the motion, plaintiff submits evidence that it provided the City with the HIPAA-compliant authorizations. Further, plaintiff states that he already submitted to an independent medical examination provided by Volunteers.

In reply, the City argues that the authorizations were provided on April 11, 2019, after plaintiff filed the Note of Issue. The City further argues that the outstanding discovery was only served after it filed the instant motion. The City notes that plaintiff failed to comply with section 202.21 of the City Uniform Rules because he materially misrepresented the status of discovery when filing the Note of Issue. Lastly, the City contends that it has a right to examine plaintiff independent of Volunteers' examination.

The City is moving pursuant to section 202.21 (e) of the City Uniform Rules, which provides that while a party must move to vacate a Note of Issue within 30 days of its service, the court has the discretion to vacate the Note at any time if material facts in the Note are incorrect. Here, the City has pointed out that plaintiff did not serve the subject authorizations until after the Note of Issue was filed, which plaintiff affirmed in his opposition papers.

The City now has the authorizations, but has not subjected plaintiff to the medical examination, pursuant to the court order. Notwithstanding that plaintiff submitted to an independent medical examination provided by co-defendant Volunteers, the City is entitled to its own examination. Therefore, while the court will not vacate the Note of Issue at this time, the City's motion is granted only to the extent that plaintiff is hereby ordered to submit to an independent medical examination. The City shall arrange same within 30 days from the date of this order. Absent good cause shown, plaintiff's failure to comply with this order shall result in the vacatur of the Note of Issue and Certificate of Readiness.

Motion Sequence Number 006

Co-defendant Volunteers moves for summary judgment and the dismissal of all claims brought against it on the ground that it is not liable for negligence. It submits as evidence the deposition testimony from (1) plaintiff, (2) Lynn Castillo ("Castillo"), an employee of Volunteers, and (3) Carlos Rivera ("Rivera"), a peace officer employed by the Department of Homeless

Services (“DHS”) They also submit a copy of the incident report regarding the assault and a copy of the City’s Shelter contract with Volunteers. From this evidence, Volunteers argues that it did not have a duty to provide security for plaintiff, as this was the duty of the City, and that the likelihood of the occurrence of this assault was not reasonably foreseeable. In the absence of a duty or foreseeability, Volunteers contends that it should be dismissed from this action.

The incident report indicates that the assault occurred on June 8, 2013, at approximately 10:45 am. The report identifies plaintiff as a resident of the shelter who was assaulted by another resident, an Anthony Coward (Coward), who attacked him in the presence of Castillo. Castillo called for help on the radio, and the operation manager of the facility, Russell Thompson, assisted her until an officer from DHS arrived and apprehended Coward. A member of the Emergency Medical Services intervened to transport plaintiff to a hospital.

At his deposition, plaintiff testified that although he knew Coward to be a resident, he never communicated with him prior to the assault. Plaintiff stated that he never knew of any incidents where Coward threatened any person at the shelter. Although another resident had informed him of Coward’s drug use and tendency toward violent behavior, plaintiff never provided anybody with this information prior to the assault. Plaintiff testified that Coward’s assault, which began with Coward striking plaintiff from behind with a pipe, was unprovoked and unexpected. Plaintiff claimed that he was assaulted for five to six minutes, and that he lost consciousness. When he regained consciousness, plaintiff stated that he saw police officers on the scene.

At her deposition, Castillo stated that she was a supervisor for Volunteers and that she worked for Volunteers for 26 years. At the shelter, she claimed that she was responsible for making rounds and taking care of residents. According to Castillo, residents were initially screened at Bellevue Hospital. Every resident was assigned a case manager, employed by Volunteers. These individuals kept records of the residents while regularly assisting them. Castillo stated that she had no knowledge of prior incidents of violence related to Coward. Castillo also testified that she witnessed Coward’s assault on plaintiff, watching him punch and kick plaintiff repeatedly after chasing him. Castillo stated that she did not see Coward displaying a pipe. She called for assistance over a radio which connected her with the operation manager, who promptly responded and assisted in stopping the assault within a minute. Later, members of DHS came to arrest Coward. Castillo stated that she did not know what happened to Coward after his arrest.

At his deposition, Rivera testified that he was employed by DHS for nearly 10 years, and that he was responsible for patrolling the shelter and training new officers. He stated that DHS was solely responsible for security in the shelter. Rivera stated that DHS personnel were equipped with batons and handcuffs and were responsible for monitoring the metal detector. Rivera testified that DHS kept records of all assaults, although he was not personally involved in the preparation of the incident report concerning plaintiff.

Volunteers submits a copy of the contract, dated July 1, 2016, executed by the City and Volunteers. Volunteers contends that it is required to maintain adequate hygiene services for the residents at the shelter and provide for food, while the City, though DHS, agreed to undertake any and all security at the shelter (*see* Article 13. Security).

Based on the evidence, Volunteers argue that it had no duty to provide security for plaintiff, and that its obligation did not go beyond notifying DHS of the assault, which it did. As for notice, Volunteers contend that in the absence of any knowledge of Coward's violent behavior prior to the assault, it cannot be held responsible for averting the assault. Therefore, Volunteers seeks summary judgment.

This motion is opposed by both plaintiff and the City. Both assert that Volunteers, as manager of the shelter, maintains a duty to provide a safe premises for its residents, regardless of contractual obligations. Plaintiff argues that there is an issue as to whether Volunteers was negligent in its effort to seek out security. In her testimony, Castillo stated that her radio only connected to the Volunteers' front desk, not to DHS security, which meant that upon receipt of a radio call, the front desk employee would have to physically locate a DHS officer in the shelter to notify him or her of the assault. Plaintiff argues that this is a questionable way to react to an emergency situation. Plaintiff also states that at the time of the assault, nobody was assigned to watch the monitor that the security video relayed to, which contained a camera covering the hallway where the assault occurred.

Plaintiff refers to DHS statistics which included the number of assaults in shelters during the 2012-2013 period. In light of the statistics, plaintiff contends that there was a need for Volunteers to provide reasonable procedures in anticipation of assaults like his, and to provide a timely way to promptly notify DHS of assaults.

The City argues that Volunteers' case managers, who are assigned to supervise and monitor residents on a daily basis, were under a duty to identify changes in behavior in residents which, in some cases, would require investigations. The City contends that there is a question of fact as to whether Volunteers knew or should have known of Coward's violent nature or any potential disputes between him and plaintiff. The City avers that it is unclear if Coward's case manager monitored his progress or any behavioral changes. The City also questions whether there was a delay in Volunteers' notifying DHS personnel during the assault.

In reply, Volunteers argues that the responsibilities alleged by the City and plaintiff to be those of Volunteers are actually those imposed on DHS, and that it acted in a reasonable manner in halting the assault. Volunteers contends that its lack of knowledge of Coward's behavior, including a potential for violence, was not unreasonable under the circumstances.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted] (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*id.* at 82).

Volunteers moves for summary judgment based on its position that it owes no duty to plaintiff with respect to his overall security and cannot be held liable for negligence in the absence of a duty. The question of whether a defendant owes a legally recognized duty of care to plaintiff is the threshold question to any negligence action and it is a legal question for the court (*see On v BKO Express LLC*, 148 AD3d 50, 52 [1st Dept 2017]). This case involves premises liability, as the assault occurred inside the shelter, which is under Volunteers' management, even though they do not own the premises.

The owner or possessor of property has a duty to maintain the premises in a reasonably safe condition for those who are lawfully present (*see Rodriguez v 1201 Realty LLC*, 10 AD3d 253, 254 [1st Dept 2004]). This is a common law duty separate from contractual duties. The City refers to specific duties in its contract with Volunteers. Section G of the contract, Supervision, lists Volunteers' duties as a supervisor of the shelter, including a duty to monitor residents to identify abrupt or progressive changes in behavior or appearance that may signify the need for additional assessment and/or services, and a duty to surveil the grounds, facility and activities of the residents to prevent theft and resident harm (*see* Section G, 1[c] and [d])). Volunteers is also responsible for its case managers, who monitor the activities of the residents assigned to them (*see* Section H, Case Management and Service Planning).

The court finds that Volunteers has a supervisory, if not security, duty to its residents in the shelter. Moreover, Volunteers has a contractual duty to protect its residents, like plaintiff, from harm. The City and plaintiff contend that there is an issue of fact as to whether Volunteers breached its duty of due care with regards to the assault.

Plaintiff argues that Volunteers was negligent in its procedure to call for security at the time of the assault. Plaintiff stated that the delay in notifying the DHS personnel was possibly due to Volunteers' failure to maintain direct communication with DHS, and that this is an issue of fact regarding negligent supervision on Volunteers' part. This claim relates to security, and it is clear that the City is responsible for security, which would indicate that this defendant would have been responsible for such a plan or procedure. Also, plaintiff's submission of the DHS statistics on assaults in City-owned shelters provides unspecific proof of the level of assaults in the subject shelter. The document does not specify the subject shelter in the assessment of assaults.

Nevertheless, plaintiff and the City have raised an issue involving Volunteers' duty to supervise the shelter under its management. Specifically, there is an issue concerning the case managers and their duty to monitor the residents assigned to them. This issue is whether the case manager assigned to Coward had properly monitored him prior to the assault, and if not, whether this failure to act properly resulted in the assault.

Volunteers contends that the assault on plaintiff was not foreseeable or anticipated, and that Volunteers had acted in a reasonable manner in response to the incident. With respect to premises liability, foreseeability and duty are not identical concepts, because foreseeability merely determines the scope of the duty once the duty is determined to exist. Accordingly, the scope of the duty is defined by past experiences and the likelihood of conduct on the part of a third party which is likely to endanger one's safety (*see Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 998 [2016]).

The court finds that whether the assault was reasonably foreseeable is an issue of fact to be determined by a trier of fact. This matter is connected to the separate but significant issue as to whether Volunteers properly monitored the assailant prior to the assault pursuant to its duty to supervise its residents.

Accordingly, it is

ORDERED that defendant City of New York's motion to compel plaintiff to attend a independent medical examination arranged by said defendant is granted and the examination is to be arranged within 30 days of the date of this order with notice of entry. Plaintiff's failure to attend within that date without providing a reasonable excuse will result in the vacatur of plaintiff's Note of Issue and Certificate of Readiness (Motion Sequence No.005); and it is further

ORDERED that defendant Volunteers of America-Greater New York, Inc.'s motion for summary judgment is denied (Motion Sequence No. 006).

December 23, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE