SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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KIP KOURI, Index No. 158476/2014

Plaintiff

- against - DECISION AND ORDER

EATALY NY LLC d/b/a EATALY NYC, EATALY USA LLC, EATALY WINE LLC, LSEBG LLC d/b/a BIRRERIA, 200 FIFTH OWNER LLC, ALLIEDBARTON SECURITY SERVICES LLC, YOHANI MENA, JORDANO MORAN, and MICHAEL DE LA SANTOS,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff claims that on July 17, 2014, defendants Mena, Moran, and de la Santos, security guards employed by defendant AlliedBarton Security Services, LLC (AlliedBarton Security defendants), injured plaintiff when removing him from restaurant premises leased by defendants Eataly NY LLC, Eataly USA LLC, Eataly Wine LLC, and LSEBG LLC and owned by defendant 200 Fifth Owner LLC (Eataly defendants). Plaintiff sues defendants to recover damages for negligence, assault, battery, discrimination, and aiding and abetting discrimination. He has discontinued

without opposition his claims for intentional infliction of emotional distress and violation of the Dram Shop Act, N.Y. Gen. Oblig. Law § 11-101(1), and his duplicative claims for negligence, discussed below. See C.P.L.R. § 3217(a)(2). The Eataly defendants and the AlliedBarton Security defendants separately move for summary judgment dismissing the amended complaint. C.P.L.R. § 3212(b). For the reasons explained below, the court grants defendants' motions in part.

II. ASSAULT AND BATTERY CLAIMS

Plaintiff claims assault and battery against only the AlliedBarton Security defendants. They maintain that plaintiff's conduct justified their use of physical force to remove plaintiff from the restaurant. Plaintiff counters that the AlliedBarton Security defendants escalated a verbal argument and that in the absence of any risk of harm to them or to customers there was no justification for their use of force.

To establish battery, plaintiff must show that the AlliedBarton Security defendants intentionally subjected him to offensive or harmful physical contact without his consent and without justification. Rivera v. State, 34 N.Y.3d 383, 389 (2019); Nicholson v. Luce, 55 A.D.3d 416, 416 (1st Dep't 2008); Charkhy v. Altman, 252 A.D.2d 413, 414 (1st Dep't 1998); Hassan

v. Marriott Corp., 243 A.D.2d 406, 407 (1st Dep't 1997). To establish assault, he must show that they placed him in fear of battery. Rivera v. State, 34 N.Y.3d at 389; Nicholson v. Luce, 55 A.D.3d 416; Holtz v. Wildenstein & Co., 261 A.D.2d 336, 336 (1st Dep't 1999); Charkhy v. Altman, 252 A.D.2d at 414. See Mitchell v. New York Univ., 129 A.D.3d 542, 543 (1st Dep't 2015); Okoli v. Paul Hastings LLP, 117 A.D.3d 539, 540 (1st Dep't 2014).

The authenticated video evidence and the deposition testimony establish that Mena, Moran, and de la Santos grabbed plaintiff while escorting him out of the Eataly defendants' premises and held him down on the sidewalk outside the premises. The videos and testimony depicting the security guards grabbing and pushing plaintiff satisfy the offensive contact element of battery. Cagliostro v. Madison Sq. Garden, Inc., 73 A.D.3d 534, 535 (1st Dep't 2010); Smiley v. North Gen. Hosp., 59 A.D.3d 179, 180 (1st Dep't 2009). The conflicting accounts between plaintiff's testimony and the guards' testimony regarding the circumstances surrounding the use of force to remove plaintiff, which the parties' video evidence does not resolve, leave factual issues whether the contact was justified so as to defeat the assault and battery claims. Shields v. City of New York, 141 A.D.3d 421, 422 (1st Dep't 2016). See Elias v. City of New York,

173 A.D.3d 538, 539 (1st Dep't 2019); Fauntleroy v. EMM Group Holdings LLC, 133 A.D.3d 452, 453 (1st Dep't 2015); Salichs v. City of New York, 127 A.D.3d 406, 407 (1st Dep't 2015).

AlliedBarton Security is liable for the actions of Mena, Moran and de la Santos to the extent that they were acting within the scope of their job duties or furthering AlliedBarton Security's business. Gregory v. National Amusements, Inc., 179 A.D.3d 468, 469 (1st Dep't 2020); Salem v. MacDougal Rest. Inc., 148 A.D.3d 501, 502 (1st Dep't 2017). Conflicting testimony whether the Eataly defendants' employees directed the guards raises factual issues whether the guards were acting pursuant to the Eataly defendants' direction and, if so, whether those acts were within the scope of the guards' employment. Hormigas v. Vill. E. Towers, Inc., 137 A.D.3d 406, 407 (1st Dep't 2016). To the extent that the parties' experts establish a security industry standard, their conflicting opinions whether the AlliedBarton Security defendants complied with that standard also raise factual issues whether their use of force was justified. Morera v. New York City Tr. Auth., 182 A.D.3d 509, 509 (1st Dep't 2020); Ayers v. Mohan, 182 A.D.3d 479, 480 (1st Dep't 2020); Hornsby v. Cathedral Parkway Apts. Corp., 179 A.D.3d 584, 584 (1st Dep't 2020); Shewbaran v. Laufer, 177 A.D.3d 510, 511 (1st

Dep't 2019).

III. NEGLIGENCE CLAIM

Plaintiff's first claim alleges that the Eataly defendants negligently allowed him to become injured through their employees' actions and failed to provide adequate security. Plaintiff discontinues his fifth and seventh claims alleging that defendants breached a duty to prevent foreseeable harm to plaintiff, as the two claims are identical and merely restate his first claim using different terminology.

The only harm that plaintiff alleges arose from the actions of Mena, Moran, and de la Santos. The Eataly defendants are not liable for the injury caused by Mena, Moran, and de la Santos, independent contractors, unless the Eataly defendants actually supervised the security guards, rather than merely retaining overall supervisory authority. Rivera v. 11 W. 42 Realty Invs., L.L.C., 176 A.D.3d 587, 588 (1st Dep't 2019); McLaughlan v. BR Guest, Inc., 149 A.D.3d 519, 520 (1st Dep't 2017); Alves v. Petik, 136 A.D.3d 426, 426 (1st Dep't 2016) Fernandez v. 707, Inc., 85 A.D.3d 539, 540 (1st Dep't 2011). While Conor Martin, Eataly's assistant general manager, testified at his deposition that neither he nor Eataly employees supervised the guards, he also testified that Eataly managers were permitted to use the

guards to ask unruly patrons to leave the premises and escort those persons out. Moran also testified inconsistently regarding whether the Eataly managers directed or controlled the security guards. The other AlliedBarton Security defendants testified that the Eataly managers did direct the security guards. This conflicting testimony raises factual and credibility issues regarding the Eataly defendants' control over the security guards. Utica Mut. Ins. Co. v. Style Mgt. Assoc. Corp., 28 N.Y.3d 1018, 1019 (2016); S.A. De Obras y Servicios, COPASA v. Bank of Nova Scotia, 170 A.D.3d 468, 473 (1st Dep't 2019); Osguera v. Lincoln Props. LLC, 147 A.D.3d 704, 705 (1st Dep't 2017).

Plaintiff contends that the Eataly defendants are liable for the AlliedBarton Security defendants' negligence regardless of the AlliedBarton Security defendants' status as independent contractors, based on the Eataly defendants' non-delegable duty to maintain safety at their premises. Kleeman v. Rheingold, 81 N.Y.2d 270, 274 (1993); Vullo v. Hillman Hous. Corp., 173 A.D.3d 600, 600 (1st Dep't 2019); Ehrenberg v. Regier, 142 A.D.3d 765, 766 (1st Dep't 2016); Nelson v. E&M 2710 Clarendon LLC, 129 A.D.3d 568, 569 (1st Dep't 2015). The Eataly defendants are not liable under that theory, however, because plaintiff claims that

only the AlliedBarton Security defendants' intentional conduct caused his injury. Although the AlliedBarton Security defendants seek summary judgment dismissing plaintiff's negligence claims, plaintiff does not claim the AlliedBarton Security defendants' negligence. Palker v. MacDougal Rest. Inc., 96 A.D.3d 629, 630 (1st Dep't 2012); Cagliostro v. Madison Sq. Garden, Inc., 73 A.D.3d 534, 535 (1st Dep't 2010); Smiley v. North Gen. Hosp., 59 A.D.3d 179, 180 (1st Dep't 2009).

IV. DISCRIMINATION CLAIMS

Plaintiff claims that defendants deprived him of access to a place of public accommodation based on his sexual orientation in violation of the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL) and aided and abetted in such discrimination. The NYSHRL, N.Y. Exec. Law § 296(2)(a), prohibits a place of public accommodation from denying persons any "accommodations, advantages, facilities or privileges" because of the persons' sexual orientation. The NYCHRL, N.Y.C. Admin. Code § 8-107(4), similarly prohibits a place or provider of a public accommodation from denying persons any "accommodations, advantages, services, facilities or privileges" because of the persons' sexual orientation. The NYSHRL, N.Y. Exec. Law § 296(6), prohibits aiding and abetting discrimination.

Griffin v. Sirva, Inc., 29 N.Y.3d 174, 187 (2017). The NYCHRL, N.Y.C. Admin. Code § 8-107(6), prohibits defendants from aiding, abetting, inciting, compelling, or coercing any act forbidden under the NYCHRL. Schindler v. Plaza Constr. LLC, 154 A.D.3d 495, 496 (1st Dep't 2017).

Defendants contend that the evidence nowhere shows any discrimination against plaintiff based on his sexual orientation. The Eataly defendants maintain that, rather than showing that their employees engaged in discrimination against plaintiff based on his sexual orientation, the evidence shows that they requested his removal from their restaurant based on his disruptive and argumentative conduct. The AlliedBarton Security defendants maintain that their guards' offensive remarks and gestures alone do not establish discrimination and that the Eataly defendants directed plaintiff's removal. In opposition, plaintiff contends that the guards' anti-homosexual remarks and gestures, which the Eataly defendants condoned, sufficiently demonstrate discrimination based on his sexual orientation.

Homophobic slurs in conjunction with actions taken against plaintiff, to which he and two members of his party attested, demonstrate discrimination. Sandiford v. City of N.Y. Dept. of Educ., 22 N.Y.3d 914, 916 (2013). See Hernandez v. Bankers Trust

Co., 5 A.D.3d 146, 147 (1st Dep't 2004). While defendants in their depositions did not admit their knowledge of plaintiff's sexual orientation, Priore v. New York Yankees, 307 A.D.2d 67, 72 (1st Dep't 2003), plaintiff suggests that his attire indicated he was homosexual, and the very fact that the security guards directed anti-homosexual slurs and gestures toward him demonstrates the guards' perception, if not their knowledge, that he was homosexual. Adverse action based on a perception that plaintiff was homosexual is all that is required for discriminatory treatment. N.Y. Exec. Law § 292(27); N.Y.C. Admin. Code § 8-107(20); Albunio v. City of New York, 16 N.Y.3d 472, 478 (011); Schwartz v. Consolidated Edison, Inc., 147 A.D.3d 447, 447-48 (1st Dep't 2017); Vig v. New York Hairspay Co., L.P., 67 A.D.3d 140, 146 (1st Dep't 2009). Although Mena, Moran, and de la Santos in their depositions denied using any homophobic slurs or gestures, and a nonparty witness, Jennifer Roff, in her deposition testified that she did not hear any homophobic slurs toward plaintiff, the conflicting testimony raises factual and credibility issues whether the guards discriminated against plaintiff based on his sexual orientation. Utica Mut. Ins. Co. v. Style Mgt. Assoc. Corp., 28 N.Y.3d at 1019; S.A. De Obras y Servicios, COPASA v. Bank of Nova Scotia, 170 A.D.3d at 473;

Osguera v. Lincoln Props. LLC, 147 A.D.3d at 705.

Because defendants' video evidence lacks sound, this evidence does not confirm either of the differing accounts. Plaintiff's video evidence includes sound, but does not depict any anti-homosexual slurs or gestures. The parties' video evidence thus does not resolve the factual issues that preclude summary judgment. Miranda-Lopez v. New York City Tr. Auth., 177 A.D.3d 431, 431 (1st Dep't 2019); Shatsky v. Highpoint Assoc. V, LLC, 170 A.D.3d 497, 497-98 (1st Dep't 2019); Derouen v. Savoy Park Owner, L.L.C., 109 A.D.3d 706, 706 (1st Dep't 2013).

Plaintiff maintains that AlliedBarton Security is vicariously liable for the actions by Mena, Moran, and de la Santos, and the Eataly defendants are vicariously liable for the AlliedBarton Security defendants' actions. An employer is liable for its employee's actions under the NYCHRL where (1) the employee exercised managerial or supervisory powers, or (2) the employer knew of or acquiesced in its employee's discriminatory conduct or failed to take immediate corrective action, or (3) the employer had reason to know of an employee's discriminatory conduct and failed to prevent or correct it. N.Y.C. Admin. Code § 8-107(13)(b)(1)-(3); Zakrzewska v. New School, 14 N.Y.3d 469, 479 (2010). An employer is vicariously liable under the NYSHRL

when the employer knew or had reason to know of an employee's discriminatory conduct. Priore v. New York Yankees, 307 A.D.2d at 72. Since Mena, Moran, and de la Santos testified that Mena was a supervisor, AlliedBarton may be vicariously liable under the NYCHRL. Dan Roldan, AlliedBarton's account manager, testified at his deposition that he was unaware of any complaints against the security guards at Eataly, but was not in that position when plaintiff was injured. The AlliedBarton Security defendants thus fail to demonstrate that AlliedBarton Security lacked knowledge of any discriminatory conduct by Mena, Moran, or de la Santos. The factual issues whether Mena, Moran, and de la Santos discriminated against plaintiff leave factual issues regarding AlliedBarton Security's vicarious liability. See DeLaurentis v. Malley, 161 A.D.3d 514, 515 (1st Dep't 2018). The only evidence regarding the relationship between the Eataly defendants and AlliedBarton Security, however, is Martin's testimony that AlliedBarton Security provided security for the Eataly defendants, which is not a basis for their vicarious liability for the AlliedBarton Security defendants' actions.

In opposition to the Eataly defendants' motion seeking dismissal of the discrimination claims, plaintiff maintains that the Eataly defendants aided and abetted the discrimination. The

Human Rights Laws, N.Y. Exec. Law § 296(6); N.Y.C. Admin. Code § 8-107(6), are interpreted broadly to include any persons who aid and abet, Griffin v. Sirva, Inc., 29 N.Y.3d at 187; Schindler v. Plaza Constr. LLC, 154 A.D.3d at 496, but aiding and abetting discrimination requires a common purpose with the perpetrator and direct participation in the discrimination. New York State Div. of Human Rights v. International Fin. Servs. Group, 162 A.D.3d 576, 576 (1st Dep't 2018); Schindler v. Plaza Constr. LLC, 154 A.D.3d at 496; Asabor v. Archdiocese of N.Y., 102 A.D.3d 524, 529-30 (1st Dep't 2013).

The only conduct plaintiff identifies as aiding and abetting was by Sarah Kostulias, an Eataly floor manager, who struck the cellphone of a person using it to record video, demanded that the person "get the fuck out of here," hurled further profanities, and thus escalated the conflict. Aff. of Joseph A. H. McGovern Ex. M, at 99, Ex. Q, at 104. This conduct, albeit offensive, does not evince discrimination based on sexual orientation. DeLaurentis v. Malley, 161 A.D.3d at 515; Berner v. Gay Men's Health Crisis, 295 A.D.2d 119, 119-20 (1st Dep't 2002); Brennan v. Metropolitan Opera Assn., 284 A.D.2d 66, 70-71 (1st Dep't 2001). See Taylor v. New York Univ. Med. Ctr., 2 A.D.3d 244, 244 (1st Dep't 2003). Therefore plaintiff's aiding and abetting

discrimination claim also fails against the Eataly defendants. See Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 314 (2004).

V. PUNITIVE DAMAGES

The Eataly defendants also seek summary judgment dismissing plaintiff's claim for punitive damages. In opposition, plaintiff claims punitive damages against the Eataly defendants based only on their vicarious liability for the AlliedBarton Security defendants' discriminatory actions. Since the Eataly defendants are not liable for the AlliedBarton Security defendants' discriminatory actions, the Eataly defendants are entitled to summary judgment dismissing plaintiff's punitive damages claim.

The NYSHRL does not permit recovery of punitive damages for discrimination in any event, Thoreson v. Penthouse Intl., 80 N.Y.2d 490, 499 (1992), but the NYCHRL does permit recovery of punitive damages for willful or reckless discrimination. Chauca v. Abraham, 30 N.Y.3d 325, 329 (2017). While the Eataly defendants are not vicariously liable for the AlliedBarton Security defendants' discriminatory conduct, the factual disputes regarding the discrimination claims raise issues whether the AlliedBarton Security defendants engaged in willful or reckless discriminatory conduct. These issues preclude summary judgment

dismissing plaintiff's punitive damages claim against the AlliedBarton Security defendants under the NYCHRL.

VI. CONCLUSION

In sum, the court grants the motion for summary judgment by defendants Eataly NY LLC, Eataly USA LLC, Eataly Wine LLC, LSEBG LLC, and 200 Fifth Owner LLC to the extent of dismissing plaintiff's fifth and seventh claims for negligence and sixth claim for violation of the Dram Shop Act, N.Y. Gen. Oblig. Law § 11-101(1), based on his voluntary discontinuance. C.P.L.R. § 3217(b). The court also grants these defendants summary judgment dismissing plaintiff's ninth and eleventh claims for aiding and abetting discrimination, N.Y. Exec. Law § 296(6); N.Y.C. Admin. Code § 8-107(6), and his claims for punitive damages under the NYSHRL, N.Y. Exec. Law § 296(2), and NYCHRL, N.Y.C. Admin. Code § 8-502(a). C.P.L.R. § 3212(b) and (e). The court grants the motion for summary judgment by defendants AlliedBarton Security Services LLC, Mena, Moran, and de la Santos to the extent of dismissing plaintiff's fourth claim for intentional infliction of emotional distress and fifth and seventh claims for negligence, based on his voluntary discontinuance. C.P.L.R. § 3217(b). The court otherwise denies both motions. C.P.L.R. § 3212(b). This

decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: September 25, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C