SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO **PART** IAS MOTION 41EFM

Justice

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CARTER SATTERFIELD,

Plaintiff,

- v -

RIVINGTON F & B, LLC,JEROMES AT RIVINGTON, JEROMES AT RIVINGTON F B, JEROMES AT RIVINGTON F & B, RIVINGTON F B, PAUL SERES, ALEKSANDRA DROZD, JONAS PELLI, JOHN DOE, JOHN BOES,

Defendant.

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INDEX NO. 150478/2017

MOTION DATE 03/18/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for JUDGMENT - SUMMARY.

In this action commenced by plaintiff for personal injuries sustained during a bar fight, defendant, Rivington F&B, LLC, moves for summary judgment dismissing the complaint in its entirety, pursuant to CPLR 3212, for sanctions, pursuant to CPLR 8303-a, and for costs, pursuant to 22 NYCRR §130-1.1. Plaintiff cross-moves to strike defendant's answer and/or preclude defendant from offering certain testimony based on spoliation of evidence, pursuant to CPLR 3126, and for costs, sanctions, and attorney's fees, pursuant to 12 NYCRR §130-1.1.

The undisputed underlying facts of this case are as follows: During the late night hours of Friday January 15, 2016, plaintiff Carter Satterfield and three friends visited the "Jerome's at Rivington" bar, owned by defendant Rivington F&B, LLC, and managed and staffed by the various remaining defendants. After an altercation with another patron, Satterfield was escorted out of the bar by a bouncer. One of plaintiff's friends, Patrick Magnarelli, then exited the bar and got into a physical altercation with the same

bouncer that had removed Satterfield. Satterfield joined the fight, and shortly thereafter suffered three broken bones in his face.

Defendant argues that they are entitled to summary judgment dismissing the claims against them on both procedural and substantive grounds. On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc3d 1217[A], 2017 NYSlipOp 50619[U] [Sup Ct, NY County 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

Initially, defendant argues that the complaint must be dismissed due to the passing of the applicable statute of limitations. Plaintiff's claims were e-filed on January 16, 2017 and the incident in question occurred in the early hours of January 16, 2016. The statute of limitations for intentional torts is one year however, when the day the statute of limitations is set to expire is a Saturday, Sunday, or public holiday, the last day to commence the action becomes the next business day (Gen. Constr. L. § 25-a; NY County Law 6 206-a [2]).

Defendant argues that plaintiff's filing of the complaint was invalid because plaintiff e-filed the complaint on a holiday. However, contrary to defendant's arguments, the fact that the day of the filing was a holiday merely operates to make the next day, the

17th, the day that the Court officially received the filing. As the 17th was still within the time permitted by the statute of limitations, plaintiff's claims were timely filed.

Rivington F&B also argues that it is entitled to summary judgment dismissing the causes of action against it for assault and battery because plaintiff and his friends drunkenly started the fight with the bouncers, and any injuries sustained by plaintiff were sustained while he was perpetrating a crime or otherwise engaging in illegal conduct. To maintain a claim for tortious assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact (*Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475 [2005]; *see Bastein v Sotto*, 299 AD2d 432, 433 [2002]). "The elements of a cause of action for battery are bodily contact, made with intent, and offensive in nature" (*Tillman v Nordon*, 4 AD3d 467, 468 [2004]; *see Zaraggen v Wilsey*, 200 AD2d 818, 819, [1994]).

An intentional tort committed by an employee can result in liability for his employer under a theory of *respondeat superior,* if the employee was acting within the scope of his or her employment at the time of commission of the tort (*see Fernandez v Rustic Inn, Inc.*, 60 AD3d 893 [2009]; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599 [2006]). The employer need not have foreseen the precise act or manner of the injury as long as the general type of conduct may have been reasonably foreseeable (*see Ramos v Jake Realty Co.*, 21 AD3d 744 [2005] citing *Riviello v Waldron*, 47 NY2d 297 [1997].

When businesses hire security guards or bouncers to maintain order, the physical force used by those bouncers may be within the scope of their employment (*Fauntleroy v EMM Grp. Holdings LLC*, 133 AD3d 452, 453 [2015] citing *Babikian v Nikki Midtown, LLC*, 60 AD3d 470, 471 [2009]). It is for a jury to consider whether a bouncer is acting reasonably and within the scope of his duties, or if the actions taken were excessive and unreasonable under the circumstances (*Id.*; *Babikian v. Nikki Midtown, LLC*, 60 AD3d 470,

471 [2009]; *see also Fugazy v Corbetta*, 34 AD3d 728, 729 [2006]); *Siegell v Herricks Union Free School Dist.*, 7 AD3d 607, 609 [2004].

In opposition to defendant's motion, plaintiff offers testimonial evidence to contradict defendant's account of the incident. He testified, and submitted affidavits from eyewitnesses, asserting that he was hurt while trying to stop the bouncers from wrongfully "teaming up" and assaulting his friend unnecessarily. Given the contradictory versions of events and the credibility determinations that necessarily must be made to reconcile them, whether the bouncers were acting reasonably and within the scope of their employment are issues for a jury to consider. As such, summary judgment dismissing the causes of action related to assault and battery cannot be granted.

Defendant also argues that the cause of action for negligent hiring, training, supervision, and retention must be dismissed. Even where a bouncer's actions are found to be beyond the scope of his employment, a jury could nevertheless hold his employer liable on a theory of negligent hiring, training, supervision, and retention (*see Babikian v. Nikki Midtown, LLC*, 60 AD3d 470, 471 [2009] [reversing a dismissal of both the negligent hiring claims and the *respondeat superior* claims against the bar that hired a bouncer alleged to have committed an assault]). Allegations of negligent hiring and supervision, though incompatible with a claim of vicarious liability, do not require dismissal because a plaintiff may plead inconsistent theories in the alternative (*McCarthy v Mario Enterprises, Inc.*, 163 AD3d 1135, 1137–38 [2018]).

In this case, if after being presented with all of the evidence the jury were to find that the bouncers' actions were beyond the scope of their employment, it could nevertheless hold the bar responsible on a theory of negligent hiring, training, supervision, and retention. As such, that cause of action against the bar cannot be dismissed at this time.

As to that branch of defendant's motion which seeks sanctions and costs, while the merits of plaintiff's claims are have yet to have been determined, they are not frivolous on their face. As such that branch of defendant's motion is also denied.

On his cross-motion, plaintiff moves to strike defendant's answer o,r in the alternative, to preclude defendant from offering certain testimony, and for sanctions, due to defendant's alleged spoliation of a videotape that would have contained material evidence. However, plaintiff has failed to sufficiently demonstrate that defendant negligently or intentionally spoiled evidence to warrant either striking the defendant's answer or sanctions (*see Dessources v Good Samaritan Hosp.*, 65 AD3d 1008, [2009]; *Balaskonis v HRH Const. Corp.*, 1 AD3d 120 [2003]). As to the admissibility of testimony regarding what would have been on the videotape in question, the trial judge can determine what evidence to admit for the jury's consideration at the time of the trial. As such, the cross motion is denied in its entirety.

Accordingly, it is

ORDERED that defendant's motion and plaintiff's cross motion are both denied in their entirety; and counsel are directed to contact the Court at (646) 386-5429 to arrange a virtual status conference.

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12/18/2020
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE