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Rosen v. MHM Realty LLC

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2022 NY Slip Op 30854(U)

STEVEN ROSEN, Plaintiff,

v.

**MHM REALTY LLC, MANHATTAN SKYLINE MANAGEMENT CORP.,
FRANCISCO MEDINA Defendants.**

Docket No. Index No. 160724/2015, Motion Seq. Nos. 005, 006.

Supreme Court, New York County.

Motion October 18, 2021.

Motion August 18, 2021.

March 14, 2022.

DECISION + ORDER ON MOTION

PAUL A. GOETZ, J.S.C.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 248, 250, 251, 252, 253, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 306, 308, 309, 310, 317, 318, 319, 320, 322 were read on this motion to/for JUDGMENT — SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 249, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 307, 311, 312, 313, 314, 315, 316, 321, 323 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Plaintiff Steven Rosen, a tenant in a building owned by defendant MHM Realty LLC and managed by defendant Manhattan Skyline Management Corp. (together "Landlord Defendants") commenced this action in October 2015 for, inter alia, assault, battery and harassment arising out of the alleged conduct of defendant Francisco Medina, a doorman in the building. Both plaintiff and defendant Medina have either lived or worked at the building for a long time and their dispute appears to have been on-going since at least 2007. The Landlord Defendants now move pursuant to CPLR 3212 for summary judgment seeking dismissal of all claims asserted against them (motion #005). Defendant Medina also moves pursuant to CPLR 3212 for summary judgment seeking dismissal of all claims asserted against him (motion #006). Plaintiff cross-moves pursuant to CPLR 3025 to conform the pleadings to the evidence or

alternatively, for leave to file an amended complaint, in order to assert a claim for negligent retention.

Turning to the cross-motions first, under CPLR 3025, a party may amend a pleading "at any time by leave of court, before or after judgment to conform the pleading to the evidence." [Kimso Apartments, LLC v. Gandhi, 24 N.Y.3d 403, 411 \(2014\)](#). Further, absent prejudice, courts are free to permit amendment even after trial. *Id.* Here, defendants have not submitted any argument or proof to show that they will be prejudiced by the assertion of the negligent retention claim. Further, contrary to the argument asserted by the Landlord Defendants, this claim is not time barred because under CPLR 203(f), because it relates back to the negligent hiring claim asserted in the complaint. Under CPLR 203(f), "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." [Lang-Salgado v. Mount Sinai Medical Center, 157 A.D.3d 532, 533 \(1st Dep't 2018\)](#). Here, the complaint and the bill of particulars gave defendants adequate notice that the negligence claim was not merely based on their hiring practices but also that the Landlord Defendants had notice of defendant Medina's alleged violent propensities and harassment and failed to adequately address the issue. See [Alharezi v. Sharma, 304 A.D.2d 414, 415 \(1st Dep't 2003\)](#). Accordingly, plaintiff's complaint is deemed to include a claim for negligent retention.

Regarding the Landlord Defendants' motion for summary judgment, the motion must be granted to the extent it seeks dismissal of the negligent hiring claim as there is no evidence that the Landlord Defendants violated any duty in hiring defendant Medina, and in any event, such hiring occurred at least twenty years prior to the alleged assault. With regard to the negligent retention claim, the only argument asserted by defendants to dismiss this claim is that it is untimely asserted. However, as discussed above, the negligent retention claim relates back to the complaint and therefore cannot be dismissed on this basis. With respect to the second and third causes of action for assault and battery, plaintiff does not dispute the argument by the Landlord Defendants that they cannot be held liable for these intentional acts and thus these claims will be dismissed insofar as they are asserted against the Landlord Defendants. Next, the Landlord Defendants argue that plaintiff's fourth cause of action for harassment under Administrative Code of City of New York Section 27-2005(d) should be dismissed as any such claim must be brought in Housing Court. However, the Supreme Court is a court of competent jurisdiction for purposes of adjudicating this violation as provided in Administrative Code Section 27-115(m)(2) and thus the claim cannot be dismissed on this basis. [Carlson v. Chelsea Hotel Owner LLC, 159 N.Y.S.3d 833 \(1st Dep't 2022\)](#). Finally, the Landlord Defendants argue that plaintiff's complaint should be dismissed because he fails to state a claim for damages. However, even if plaintiff did not suffer a physical injury as a result of defendants' conduct, recovery is permitted for negligently induced emotional harm without physical injury where the breach of duty results in creating an unreasonable risk of harm to the plaintiff or threat to the plaintiff's own physical safety. [Greene v. Esplanade Venture, 36 N.Y.3d 513, 520-21 \(2021\)](#) (citing [Battalla v. State, 10 N.Y.2d 237 \[1961\]](#)). Because the Landlord Defendant's alleged negligent retention of defendant Medina resulted in the alleged assault and battery, the claim of negligence against the Landlord Defendants cannot

be dismissed on this basis.

Turning to defendant Medina's motion, the first cause of action for negligent hiring and the newly added negligent retention claim are not applicable to defendant Medina and to the extent they are asserted against him, they must be dismissed. Likewise, to the extent that plaintiff seeks to base his second and third causes of action for assault and battery against defendant Medina on conduct which occurred prior to October 20, 2014, or one year prior to the commencement of the action, such allegations must be dismissed as time barred.

With regard to the second cause of action for assault, this claim appears to be based on an incident in August 2015 for which the parties submitted a video as well as deposition testimony. While the video clearly depicts plaintiff videotaping defendant Medina in a provocative manner on his phone, it is well established that no overt act, conduct, insult or word by the plaintiff, if unaccompanied by an overt act of hostility, will justify an assault no matter how offensive or exasperating the provocative conduct may be. *Dennis v. Stout*, 24 A.D.2d 461 (2d Dep't 1965). Further, while defendant Medina testified that he did not intend to scare the plaintiff and took the metal instrument out of his drawer for self-protection, the footage from the video is sufficient to create an issue of fact as it can be seen that defendant Medina approached plaintiff as he was walking away and appears to stop him from leaving to go to the elevators. Thus, there is an issue of fact with regard to defendant Medina's intent and this cause of action will not be dismissed.

With regard to the third cause of action for battery, this claim appears to be based on an incident in early 2015 when plaintiff went to retrieve a package that was delivered to him. Plaintiff claims that defendant Medina allegedly threw the package at him and hit him in the back. Defendant Medina denies the incident and so the only supporting testimony in the record is from plaintiff, who stated that he did not see defendant Medina throw the package at him. Defendant Medina argues that this is fatal to the claim and that plaintiff is merely speculating that defendant Medina threw the package at him, rather than, for example, a package falling from the shelf. However, there is other evidence to support the plaintiff's claim, such as the plaintiff's testimony regarding the force with which the package hit him and that it was indeed his package, rather than a random package from the shelf, which hit him. Accordingly, there is an issue of fact with regard to the battery claim and it cannot be dismissed.

Finally, plaintiff's fourth cause of action for harassment under Administrative Code of City of New York Section 27-2005(d) must be dismissed to the extent it is asserted against defendant Medina as he is not an "owner" as defined by Administrative Code of the City of New York Section 27-2004(a)(45). See *Hucey v. Frezza*, 70 Misc.3d 1222(A), at * 11 (Civ. Ct. N.Y. Cty. March 10, 2021). Accordingly, it is

ORDERED that the cross-motion to conform the pleadings to the proof is granted and the complaint shall be deemed to assert a cause of action for negligent retention; and it is further

ORDERED that the Landlord Defendants' motion for summary judgment is granted only to the extent that the causes of action for negligent hiring and assault and battery are dismissed as to the Landlord Defendants, and is otherwise denied; and it is further

ORDERED that defendant Medina's motion for summary judgment is granted only to the extent that the causes of action for negligent hiring and retention, harassment under Administrative Code of City of New York Section 27-2005(d) are dismissed and to the extent that the assault and battery claims are based on conduct prior to October 20, 2014, and is otherwise denied.