PART 13

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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GALICIA, EFRAIN Index №. **0024973/2015**

-against- Hon. **FERNANDO TAPIA,**

TRUMP, DONALD J Justice Supreme Court

----------X [006]

The following papers numbered 1 to ____ Read on this motion, **SUMMARY JUDGEMENT DEFENDANT** Noticed on **August 01 2017** and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

SEE ANNEXED DECISION & ORDER.

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 8/20/2018

Hon. _____
FERNANDO TAPIA, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

EFRAIN GALICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, JOHNNY GARCIA & MIGUEL VILLAOBOS

Plaintiffs,

- against -

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER, GARY UHER, EDWARD JON DECK, JR., AND JOHN DOES 3-4,

Defendants.

Index: 24973-2015E

Hon. Fernando Tapia, J.S.C.

DECISION

Plaintiffs bring this action against defendants alleging assault and battery, conversion and destruction of property, negligent hiring and supervision. Defendants Donald J. Trump (Trump), The Trump Organization, LLC (Trump Organization), and Keith Schiller move for an order under CPLR 3212 granting summary judgment in favor of the defendants. The remaining defendants, Donald J. Trump for President, Inc (Trump Campaign), Gary Uher, Edward Jon Deck, Jr in a similar motion move for the same relief. This decision will address both motions.

I. Assault and Battery

Defendants argue that plaintiff Perez assault and battery claim must fail as she was unsuccessful in coming forward with evidentiary proof sufficient to demonstrate who precisely committed an assault or battery against her. Perez testified at her deposition that a "short" and "dark-skin" security guard that came out of Trump tower and identified himself as working for defendant Trump touched her without consent. [1] Perez further testified that the security guard

[1] Perez tr at 35-39.

who touched her asked to her to remove her costume and "leave the place." [2] Defendant Deck testified that he approached a female protestor wearing a Ku Klux Klan costume and told her "you guys need to move because this is not - it's not a safe environment." [3] The issue of whether defendant Deck was, in fact, the same individual as alleged by Perez or possibly one of the John Doe defendants, plaintiff argues, would be a question of fact [4] for the jury to determine. In either instance, if it is found that Deck or defendant John Doe had, in fact, made contact with Perez, defendants Trump, Trump Organization, and Trump Campaign would be liable under the doctrine of respondeat superior. Under the doctrine of respondeat superior, an employer may be held vicariously responsible for a tort committed by his or her employee within the scope of employment. [5] Defendants have failed to meet their prima facie burden of entitlement to judgment on Perez's claim as a matter of law.

Defendants also seek to dismiss plaintiff Galicia assault and battery claim on the grounds that Schiller was acting in self-defense when he assaulted him. "The necessity of protecting one's self against attack is a defense against liability for assault and battery as a justification for acts which otherwise would constitute the tort." [6] The facts surrounding the altercation between Schiller and Galicia are disputed. Plaintiff asserts that the assault by defendant Schiller on Galicia took place when Schiller made physical contact with Galicia by tearing away a sign from Mr. Galicia's hand. [7] Defendants contrarily assert that Schiller had removed a sign that was impeding traffic and Galicia, in fact, was the one who initiated the contact. [8] After this initial

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[2] *Id* at 38, lines 11-12.
[3] Deck tr at 96-97.
[4] *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 852 (1985) (On a motion for summary judgment, the proponent "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").
[5] *Jones v Hiro Cocktail Lounge*, 139 AD3d 608 (1st Dept. 2016).
[6] 6A NY Jur Assault -- Civil Aspects § 11.
[7] Galicia tr at 79-81.
[8] Schiller tr at 105-106, 124-125, 132-133.

contact by Galicia, defendants assert, Schiller acted in self-defense in repelling Galacia off his person. [9] Questions of facts abound; defendants have failed to eliminate material issues of facts from this case.

Furthermore, Galicia in action for a tortious battery can recover damages for pain and suffering. Those damages can be found in the testimony of the plaintiff alone. [10] Mr. Galicia went to Lincoln Hospital where he complained of pain and anxiety. [11] Plaintiff's subjective testimony of pain may be sufficient to establish an injury for which he or she is entitled to some compensation. Summary judgment on Galicia's assault and battery claims are denied.

II. Conversion & Destruction of Property

In this claim, it is alleged that defendants took possession of plaintiffs' banners without their consent by forcibly taking from them while they stood on the public sidewalk in front of Trump Tower. [12] "To establish a claim for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or the exclusion of the plaintiff's rights." [13] Defendants assert that plaintiff has failed to establish the signs were altered or that the plaintiffs were deprived of their ability to use them.

To the contrary, plaintiffs posit that defendant Schiller tore one of the signs and then took possession of their banner for six weeks. [14] Plaintiffs by submitting evidence of damage to one of the signs by Schiller and the unlawful confiscation of the banner to the exclusion of the

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[9] *Id.*
[10] *See McCombs v. Hegarty*, 205 Misc. 937, 130 N.Y.S.2d 547; *Levine v Abergel*, 127 AD2d 822 (2nd Dept 1987).
[11] Galicia tr at 97-106.
[12] Galicia tr at 72-81.
[13] *A & G Research, Inv. v. GC Metrics, Inc.*, 19 Misc.3d 1136[A (N.Y.Sup.Ct. 2008) *citing Independence Discount Corp. v. Bressner,* 47 A.D.2d 756 (2d Dept.1975).
[14] Galicia tr 81.

plaintiff's rights have met their prima facie burden. The assertion that plaintiffs must prove their intended use of the signs while the signs were in defendants' possession is without merit. Defendants fail to provide any legal precedent for this notion. Summary judgment on the conversion and destruction claim is denied.

III. Negligent Hiring, Retention & Supervision

The court next examines whether defendants Trump Organization or Mr. Trump met their burden for summary judgment on the claim that they cannot be found liable for defendants Schiller, Deck and Uher's intentional tort under the theory of negligent hiring, retention, and supervision. Defendants argue that this claim must be dismissed, citing *Karoon v New York City Transit Authority,* [15]

> **"Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training."**

Defendants argue since the acts were within the scope of Schiller, Deck and Uher employments, the plaintiffs cannot maintain a claim against their employers for negligent hiring or supervision. They additionally argue that plaintiffs' claim for negligent hiring, retention, and supervision fails as a matter of law since the record is devoid of any evidence that they knew or should have known [16] of Schiller, Deck and Uher's propensity for violence or assaultive

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[15] 241 AD2d 323 (1st Dept 1997).

[16] *Sheila C. Povich*, 11 AD3d 120, 129-130 (1st Dept 2004) (employer knew or should have known of the employee's "propensity for the sort of conduct that caused the injury").

behavior. Plaintiffs in their opposition failed to present any theory as to how this alleged intentional tort was outside the scope of these employees' duties and furthermore provided no proof of any prior bad acts or disciplinary actions that would indicate a propensity for the alleged tortious conduct. Plaintiffs cause of action for negligent hiring, retention, and supervision is dismissed.

IV. Respondeat Superior

The doctrine of respondeat superior generally imposes liability for acts of an employee upon the employer if the employee was acting within the scope of his employment. [17] Determination of whether acts are within the scope of employment for purposes of vicarious liability, require an inquiry into whether they advance the interests of the employer in some way and are not done solely to benefit the employee. [18]

Defendant Trump moves to dismiss all remaining claims against him as he was not involved in the altercation and never exercised dominion or control over the seized banner. Similarly, Trump, Trump Campaign, and the Trump Organization move to dismiss because defendants Uher and Deck were not their employees or agents and therefore vicarious liability fails to apply. Specifically, they argue that defendants Uher and Deck were never employed by them, and were, instead of employees of XMark, a third-party, independent contractor.

In this analysis of the doctrine of respondeat superior, it must be noted the apparent association between defendants Trump, Trump Organization, and Trump Campaign, or synonymously the man, his company, and his campaign. Defendants motion to disassociate the actions of Schiller, Uher, and Deck from Trump, his namesake company, and campaign as a matter of law is unavailing. To the contrary, plaintiffs raise ample issues of fact that contrary to

[17] *Cornell v State of New York*, 46 NY2d 1032, 1033 (1979).
[18] N.X. v Cabrini Medical Center, 97 NY2d 247 (2002).

moving defendants' claims, tends to exhibit Trump's dominion and control over Schiller, Uher, and Deck.

Plaintiffs point out that Trump authorized and condoned the specific type of conduct of defendants Schiller, Uher, and Deck. [19] Furthermore, plaintiffs proffer evidence that indicates Trump's knowledge of the altercation and subsequent seizure of the banner. [20] The employment relationship between Uher and Deck and Trump Campaign is also a disputed issue of fact. [21] Finally, the plaintiffs presented evidence that illustrates the close relationship between Trump and Schiller, indicating Trump's behest guided Schiller's actions.[22] The fluidity of Schiller, Uher, and Deck's employment between Trump, Trump Campaign and Trump Organization present issues of facts that need to be addressed at trial.

V. Punitive Damages

The branch of Defendants' motion seeking summary judgment striking plaintiffs' requests for punitive damages is denied. The award of punitive damages under the circumstances

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[19] Dictor Aff, Exhibit 28 (Trump speaking to reporters regarding protestors at a campaign rally: *"[T]he microphone — they just took the whole place over. And the audience, which liked him, I mean, they were him — they're saying, 'What's going on? How could this happen? That will never happen with me. I don't know if I'll do the fighting myself, or if other people will"*); Dictor Aff, Exhibit 27 (Trump speaking to reporters regarding protestors at a campaign rally: *"The man you say was roughed up, he was so obnoxious and so loud, he was screaming. I had 10,000 people in the room yesterday. 10,000 people. And this guy started screaming by himself. I don't know, rough up, he should have been – maybe he should have been roughed up because it was absolutely disgusting what he was doing"*); Dictor Aff, Exhibit 27 (Trump responding to protestors at a campaign rally: *"Throw him out into the cold! You know. Don't give them their coat. No coats. No coats! Confiscate their coats!"*).

[20] Dictor Aff, Exhibit 23 (In a December 9, 2015 interview with TIME Magazine regarding this specific protest, defendant Trump: *"They were trouble makers. With records, by the way, with records. The planters we have, they're very expensive plantings. It's called the Beautification of Fifth Avenue. We have these very expensive plants. And these guys are putting their cigarettes out on the thing, they're sitting in them. They're sitting there waiting, holding the signs, sitting on top of the plants. They were dressed as Ku Klux Klan. You know that? You know when they first came out they were dressed as Ku Klux Klan, okay. Would you think that if somebody was dressed as Ku Klux Klan—you know, they were dressed as Ku Klux Klan. And they were sitting in the planters, they were sitting on top of the plants. They did a lot of damage, we had to change the plants"*).

[21] Uher tr at 39 (Uher testifying that he did not believe he was ever paid by XMark); Deck tr at 27-32 (Deck testifying he was hired to preform security services for the Trump Organization).

[22] *See* Schiller tr 52-54 (Schiller unable to clearly identify his employer).

warranting the allowance of same rests in the discretion of the trier of facts. [23] It is for the trier of facts to determine whether defendants conduct justifies such an award, which must rise to the level of "spite or malice" or "evil motive." [24] Accordingly, it is

ORDERED that plaintiff Gonzalo Cruz Franco's claims are dismissed as he has withdrawn his claims in this action; and it is further

ORDERED that plaintiffs cause of action for negligent hiring, retention, and supervision are dismissed; and it is further

ORDERED that all other reliefs sought by defendants are denied.

This constitutes the decision of the court.

Dated: August 20, 2018

Bronx, NY

Hon. Fernando Tapia J.S.C.

[23] *Le Mistral, Inc. v Columbia Broadcasting System*, 61 AD2d 491, 495, app. dismd 46 NY2d 940.
[24] *Marinaccio v Town of Clarence*, 20 NY 3d 506 (2013).