

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

MELISSA LEWANDO,

Plaintiff(s),

-against-

MOTION DATE: 12/3/10

INDEX NO.: 601052/09

SEQ. NO. 1

CHRISTOPHER FELLINI, RALPH'S FAMOUS ITALIAN
ICES FRANCHISE CORP., JOHN DOE CORPORATIONS
1-10, JOHN DOE 1, JOHN DOE 2 and KENNETH
FELLINI,

Defendant (s)

The motion of the defendant Ralph's Famous Italian Ices Franchise Corp. (hereinafter Ralph's), pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's June 11, 2009 complaint (see movant's Exhibit A) as against it is determined as hereinafter provided.

During the early morning hours of June 17, 2008, the defendant Christopher Fellini and two unidentified individuals, i.e., the defendants John Doe 1 and John Doe 2, reportedly lured the plaintiff behind a "Ralph's Italian Ice's" franchise located at 678 West Monmtauk Highway in Lindenhurst where Mr. Fellini is alleged to have sexually assaulted her. His brother, the defendant Kenneth Fellini, apparently owned and operated the franchise. Christopher Fellini was subsequently arrested, charged with, inter alia, sexual assault and on June 22, 2010 he pleaded guilty to assault in the third degree.

In the interim, on or about June 11, 2009 the plaintiff commenced this personal injury action. The movant is alleged to have negligently hired, supervised and retained Christopher Fellini, its purported employee (para.33) who was allegedly acting within the scope of his employment when he assaulted the plaintiff (para.36). Issue was joined by Ralph's on or about October 13, 2009 (see movant's Exhibit B).

Presently, prior to disclosure, Ralph's seeks summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it because, as the franchisor, it neither owned, operated, or controlled the Lindenhurst franchise nor employed Christopher Fellini (see

movant's Exhibits C & D, the 9/28/05 franchise agreement [executed on behalf of the franchisee by a non-party, Michael Felicetti] and the 9/23/10 affidavit of Ralph's Secretary-Treasurer, Larry Silvestor).

"To establish a cause of action based on negligent hiring and supervision, it must be shown that 'the employer knew or should have known about the employee's propensity for the conduct which caused the injury'" (Marilyn S. v Independent Group Home Living Program, Inc., 73 AD3d 892,894 quoting Jackson v New York University Downtown Hosp., 69 AD3d 801). Moreover, "liability will not attach for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business" (Fernandez v Rustic Inn, Inc., 60 AD3d 893,896; see 1B PJI 3d 2:240). Here, Mr. Silvestor's affidavit and accompanying documentary evidence are sufficient to establish its prima facie entitlement to summary judgment dismissing the plaintiff's complaint as against it.

In opposition, the plaintiff has failed to create a triable issue of fact. "[C]ontrary to the plaintiff's contention, the [defendant's] motion for summary judgement dismissing the complaint [as against it is] not premature as the plaintiff [has] 'failed to offer an evidentiary basis to suggest that [further] discovery may lead to relevant evidence [citations omitted]. The 'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (Woodard v Thomas, 77 AD3d 738,740).

Accordingly, Ralph's motion, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint as against it is granted.

The Court hereby schedules a March 31, 2010 (9:30 a.m.) preliminary conference in this matter to be held in the Preliminary Conference Part (lower level).

The plaintiff is directed to serve a copy of this order upon all parties.

Dated: FEB 14 2011


ENTERED
A.J.S.C.

FEB 16 2011
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**