SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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JOHN SORRENTINO and MARGARET SORRENTINO,

Plaintiff,

- against -

Index No. 15804/04
Sequence #003
Part 41
2/2/2007

KEYSPAN CORPORATION, KEYSPAN HOME ENERGY SERVICES, LLC and ERIC GHEM,

Defendants.

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Upon the forgoing papers, defendants Keyspan Corporation and Keyspan Home Energy Services, LLC (Keyspan's) motion for an order granting summary judgment pursuant to CPLR §3212 and dismissing the complaint against Keyspan only is granted.

This action involves the alleged assault against plaintiff homeowner John Sorrentino by Keyspan's employee defendant Erich Gehm while defendant Gehm was in his house. Plaintiff had made several complaints before regarding heating problems and other Keyspan employees had either fixed or attempted to fix the boiler.

On the day in question and in response to plaintiff's complaint to Keyspan, defendant Gehm arrived at the house. According to plaintiff defendant told him that he was not here to fix the boiler but to tell plaintiff that Keyspan Vice President Cullinan said "we are finished with you and we are not bothering with you anymore." Plaintiff objected to this comment stating he had a service contract.

Eventually defendant Gehm agreed to look at the boiler. Before he did so, however, plaintiff "jokingly" made some remarks regarding "detective" procedure. Defendant Gehm then, according to plaintiff, jumped and pushed Plaintiff into the wall without provocation.

On a motion for summary judgment both parties have an obligation to produce all the evidence in their favor that they possess (*Five Boro Electrical Contractors Association v. City of New York, 37 AD2d 807, aff'd 33 NY2d 676*).

Nevertheless, in the first instance the proponent of the motion must demonstrate that even if the facts alleged by plaintiff are true, movant is entitled to summary judgment as a matter of law since there remains no question fact (*Royal v. Brooklyn Union Gas Company, 122 AD 2d 132*).
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Here defendants have made a *prima facie* showing that they are not responsible for defendant Ghem's action through either the theories of vicarious liability (respondeat superior), negligent hiring or negligent supervision by the testimony of William Zimmerman, Long Island Operations Manager for Keyspan.

Mr. Zimmerman testified that were no customer or disciplinary complaints in defendant Gehm's personnel file other than tardy attendance 25 years ago. He further testified defendant Gehm had won many employee awards including, recently, the Chief Executive Officer's superior performance award.

Therefore, with regard to negligent hiring or supervision, as a matter of law Keyspan was not liable for its employee's conduct and these causes of action are dismissed *(Carnegie v. J.P. Phillips, Inc., 28 AD3d 599)*.

Concerning vicarious liability, whether one is acting within the scope of his employment is a question of law when the facts are undisputed as they are in a motion for summary judgment (see *Crawford v. Westcott Steel Co., 188 AD2d 731*). It is plaintiff's burden to establish that the act complained of occurred while the employee was acting within that scope *(Hacker v. New York, 26 SAD2d 400,* aff'd *20 NY2d 722; e.g., Pekarsky v. New York, 240 AD2d 645)*.

The factors to be considered are the connection between the act and the time and place, the actual history of the employee with the employer, whether the act is commonly done by such an employee, the departure from normal performance and whether the act was one that could have been reasonably anticipated by the employer *(Rivillo v. Waldron, 47 NY2d 297)*.

In the case a bar, while it is alleged defendant Gehm pushed plaintiff without provocation while in plaintiff's home on official business, i.e., that his act was reckless or intentional, the test is whether the act was in furtherance of the employer's business and authority *(Ochsenheim v. Shapley, 85 NY2d 214; PJI 2:237)*. Examples would be when the use of necessary force is part of the employee's discretion while on the job *(Sims v. Bergamo, 3 NY2d 531; Rounds v. Delaware, 64 NY 129)*.

In Rounds, the Court of Appeals held "Where the authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution." Since the use of force by defendant Gehm's was not authorized by defendant Keyspan nor was pushing plaintiff in furtherance of Keyspan's business, movants are not responsible under the doctrine of respondeat superior *(see Cornell v. State of New York, 60 AD2d 714, aff'd 46 NY 2d 1032)*.

The complaint against the Keyspan defendants only is dismissed.

ENTERED

J.S.C.

Dated: February 28, 2007

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