

## OPENING STATEMENT

AGF&J recently obtained summary judgment in favor of its clients in a Federal Court case involving multiple intentional tort claims as well as causes of action premised on theories of vicarious liability. This issue's lead article discusses this decision in detail.

Also in this issue, we are pleased to report numerous other decisions in which the firm recently obtained dismissal and summary judgment in favor of our clients in cases involving first party claims, motor vehicle accidents and premises liability.

### UNITED STATES DISTRICT COURT GRANTS SUMMARY JUDGMENT TO CAFÉ IN CASE ARISING OUT OF SEXUAL ASSAULT UPON PATRON BY CAFÉ'S DISHWASHER

By: Jade M. Priest

Plaintiff, Maria Golodner, sued AGF&J's clients, Ouessant Inc. and its owners in the United States District Court for the Southern District of New York for claims of intentional infliction of emotional distress and false imprisonment under the theory of *respondeat superior*, as well as claims of negligent hiring, retention and supervision, all arising out of an incident in which she was sexually assaulted by an employee of the café. AGF&J obtained summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing all causes of action against its clients.

#### Underlying Facts

On the night of November 21, 2004, the plaintiff, Maria Golodner, finished her bartending shift at a Manhattan bar and restaurant, had a glass of wine and then went to meet her boyfriend, Tomas Besnard, at the defendants' Café at around midnight. The two were invited to a private birthday party to be held for a Café manager, Amelie Scribot, after closing that night. Scribot was a friend of Besnard.

The Café's façade includes several doors. When the plaintiff arrived at the Café on the evening in question, the establishment was still open for business and she entered through the main entrance, which was unlocked. The restaurant closed at 12:00 a.m., but the bar stayed open until 1:00 a.m.

By the time of the sexual assault on the plaintiff, the restaurant and bar were closed to the public, the restaurant lights were out and the chairs were on top of the tables. The doors were locked so that the public could not enter, but guests of the private birthday party in honor of Amelie Scribot were permitted to remain inside the bar.

When the plaintiff arrived at the Café there were thirty to forty people at the bar. She knew Amelie Scribot and the bartender, Christophe, but nobody else. Music was playing and people were dancing. According to the plaintiff, co-defendant Hereberto Olivee, a Café employee, was acting as a D.J. The Café denied this allegation as Olivee was a recently hired dishwasher who was off duty. Amelie testified that she invited him to stay, after his shift, for her party so as to make the new employee feel welcome.

The plaintiff alleges that she and Besnard remained at the bar for the entire evening. However, Scribot testified that, at some point, they left the Café and went to another party. When they returned, they called Scribot to let them in because she had already locked the doors so as to prohibit the public access to her private party.

The plaintiff testified that between 4:00 and 5:00 a.m. she decided she wanted to leave. Besnard was not ready to leave; so the plaintiff decided to leave alone. She testified that when she tried to exit through the main entrance door, it was locked. When she looked for someone to

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open the door for her, Olivee, the Café's dishwasher had keys in his hand and offered to let her out the back door. She followed him through a dark hallway where Olivee turned, grabbed the plaintiff and put his mouth to her breast. She hit him and turned to run away, but he grabbed the back of her pants and pulled her towards him. He tore the front of her pants and the left side of her top. He then pulled down her pants and sexually assaulted her. The plaintiff was carrying a heavy bag filled with bartending tools from her job with which she hit Olivee in the head and then ran back into the restaurant towards the bar. He ran after her. When she got to the bar area she picked up a glass and threw it at him. The bottle hit and cut Olivee. The plaintiff then told the bartender, Christophe, that Olivee tried to rape her. Amelie Scribot then unlocked a door and let the plaintiff out of the bar.

Coincidentally, there was an off-duty ambulance parked nearby. At the plaintiff's request, the EMT called the police. The plaintiff reported the attempted rape to the police and the ambulance took her to Beth Israel Hospital, where she was treated for a wound to her thumb caused by the broken glass. The police questioned and arrested Olivee. As a result of the incident, the plaintiff received psychological counseling for eight months.

### **Standard for Liability Under the Theory of Respondeat Superior**

In awarding summary judgment, the District Court succinctly stated that the law in New York is that "an employer can be held vicariously liable for the intentional tort of an employee when the act was committed while the employee was performing his duties for the express benefit of the employer or in furtherance of the employer's business." Higazy v. Millennium Hotels and Resorts, 346 F.Supp. 2d 430, 453 (S.D.N.Y. 2004) (citing Davis v. City of New York, 641 N.Y.S.2d 275, 276 (1st Dep't 1996)). However, the court appropriately points out in this case that "vicarious liability does not attach when the actions of the employee are personally motivated and do not further the employer's business." E.E.O.C. v. Die Fliedermaus, 77 F.Supp. 2d 460, 473 (S.D.N.Y. 1999) (citing Tomka v. Seiler Corp., 66 F.3d 1295, 1318 (2d Cir. 1995)).

While, ordinarily, whether the employee was acting within the scope of his employment is a factual question to be left to the jury to determine, under New York law, courts consider five factors when deciding whether an action falls within an employee's scope of employment: "(1) the connection between the time, place and occasion for the act; (2) the history of the relationship between the employer and employee as spelled out in actual practice; (3) whether the act is one commonly done by such an employee; (4) the extent of departure from normal methods of performance; and (5) whether the specific act was one that the employer could reasonably have anticipated." Higazy, 346 F. Supp. 2d at 453 (citing Haybeck v. Prodigy Services Co., 944 F. Supp. 326, 329 (S.D.N.Y. 1996)).

Not only was Olivee "off-duty" at the time rendered but the

the sexual nature of his actions were purely self-motivated. There was no imaginative way in which one could conclude that a sexual assault by the dishwasher would be in furtherance of the Café's business. Hence, the Court found that, as a matter of law, the Café could not be vicariously liable for Olivee's sexual assault on the plaintiff under a theory of *respondeat superior*.

### **Intentional Infliction of Emotional Distress Claim**

Plaintiff also alleged intentional infliction of emotional distress against the defendants based upon vicarious liability for injuries suffered as a result of Olivee's attack. Because the claim was based upon vicarious liability, its success depended on whether Olivee was acting within the scope of his employment. See Higazy, 346 F. Supp. 2d at 453. Primarily, the court reasoned that the facts indicate that, although Olivee was employed as a dishwasher at the time of the incident, he had already finished his shift, the establishment was closed for business and he was celebrating Amelie Scribot's birthday party at the time of the incident. Hence, the facts lead toward the conclusion that he was not on duty at the time of the incident. Furthermore, even if he had been on duty at the time of the incident, the act of sexual assault and the related intentional infliction of emotional distress, are not commonly done by an employee whose duties are to wash dishes, clean the premises and open and close the business, nor are they acts the employer should foresee as incidental to the employ of an individual in such a capacity. Again, the court pointed out that because the tortious conduct in this instance was a sexual assault, it was, based upon well settled New York law, personally motivated as opposed to in furtherance of the employer's business and therefore, not an act for which the employer can be found vicariously liable. See Adorno, 312 F. Supp. 2d at 517. Thus, the court granted the defendants' motion for summary judgment on Golodner's claim of intentional infliction of emotional distress.

### **False Imprisonment Claim**

Also premised on the theory of vicarious liability, plaintiff alleged false imprisonment against the defendants. She alleged she was falsely imprisoned because she felt trapped when she tried to exit the Café and the door was locked.

A *prima facie* showing of false imprisonment requires that (1) the defendant intended to confine the plaintiff; (2) the plaintiff did not consent to the confinement; (3) the plaintiff was aware that she was confined; and (4) the confinement was not otherwise privileged. Curley v. AMR Cor., 153 F.3d 5, 13 (2d Cir. 1998). Defendants argued, in support of their summary judgment motion, that there was no indication in the record that Amelie Scribot intended to confine Golodner when she locked the doors. Rather, she locked the doors after closing so as to prevent the public from entering during her private birthday party. The court found that Golodner's subjective feeling of being trapped was insufficient to maintain a claim of false imprisonment absent a showing that the defendants intended

to confine her. Arrington v. Liz Claiborne, Inc., 260 A.D.2d 267, 267-68 (1st Dep't 1999). Accordingly, the defendants' motion for summary judgment on the plaintiff's false imprisonment claim was granted.

### **Negligent Hiring, Retention, Supervision and Training Claim**

In situations where an employer is not found liable for an employee's tortious conduct under a vicarious liability theory, the employer may still be held liable under a theory of negligent hiring, retention, training or supervision, all of which the plaintiff pled against the Café. In its decision granting summary judgment in favor of the Café, the District Court simply stated that "proving negligent hiring, retention, supervision, or training requires a plaintiff to show that the employer knew or should have known of the employee's propensity for the conduct which caused the injury," as well as a causal connection between the employer's negligence and the plaintiff's injuries. Ehrens v. Lutheran Church – Mo. Synod, 269 F. Supp. 2d 328 (S.D.N.Y. 2003); Koran I. V. New York City Board of Edu., 256 A.D.2d 189, 192 (1st Dep't 1998). An employer's duty to investigate the tortious propensities of an employee arises when the employer knows of facts about the employee which would lead a reasonably prudent person to conduct an investigation. Ehrens at 328.

In this case, the court concluded that based upon the facts, a reasonable jury could not conclude that the Café knew or should have known that Olivee had a propensity to commit a sexual assault. Golodner alleges that the defendants were negligent in hiring Olivee without conducting a background check on him. However, the court, citing Koran I., explained that an employer's failure to perform a background check is not a basis to maintain a cause of action for negligent hiring if such a background check would not have revealed the propensity for tortious conduct. 256 A.D.2d at 191-192. In support of summary judgment, the defense offered testimony of the owner of the Café who stated that he contacted Olivee's former employer for a reference and that employer gave no indication of any dangerous propensity. In addition the defense offered evidence of a criminal background check on Olivee which revealed a clean record so as to demonstrate that, had the Café conducted such a background check before hiring the dishwasher, no information would have been revealed which would have put the defendants on notice of his propensity to commit a sexual assault or any other tortuous act. Hence, the court ruled that that the defendants were entitled to summary judgment on Golodner's claim of negligent hiring, supervision and retention.

Plaintiff has decided not to appeal this decision. For more information on this or any other cases involving employer's liability issues, please contact Jade M. Priest at [jpriest@agfjlaw.com](mailto:jpriest@agfjlaw.com)

### **RECENT DECISIONS OF INTEREST**

#### **AGF&J obtains summary judgment in first party case**

Dan Friedman won summary judgment from the New Jersey Superior Court in Cape May County for AGFJ's client in *Diamond Beach Resorts, LLC t/a Grand of Wildwood Crest vs. Underwriters at Lloyd's, London, et. al.* dismissing all of the insured's claims for punitive and extra contractual damages. Under New Jersey law an insurer is only required to have a "fairly debatable" reason to deny a claim. In *Diamond Beach*, the Superior Court found that Underwriters denial of a storm damage claim at the oceanfront hotel was proper when their investigation uncovered that the insured sustained and was aware of heat problems that result in pipe freeze-ups and water damage prior to the storm. At the Examinations Under Oath, the insured denied that there had been any problems with the heat or water damage prior to the storm.

For more information about *Diamond Beach Resorts, LLC t/a Grand of Wildwood Crest vs. Underwriters at Lloyd's, London, et. al.* or first party "bad faith" claims, contact Dan Friedman at [dfriedman@agfjlaw.com](mailto:dfriedman@agfjlaw.com).

#### **AGF&J obtains summary judgment in Premises Liability case involving a "trivial sidewalk defect"**

Bryan Goldstein recently obtained summary judgment in favor of AGF&J clients Broadway Crescent Realty Inc. and M&N Management Corp. in a case in which the plaintiff tripped and fell on the sidewalk in front of the clients' premises. The court held that the defendants met their initial burden by establishing that the sidewalk defect was trivial and did not have any characteristics of a trap or snare since the defect was no greater than ½ inch in height when they offered testimony of the superintendent and expert who went to the location and took measurements and photographs indicating the height of the defect. Thus, the burden shifted to the plaintiff to offer evidence in admissible form which creates a question of fact. The plaintiff, Nertha Delarosa, failed to meet her burden when she failed to offer any probative evidence in the form of photographs, expert testimony or otherwise. Plaintiff only offered a self serving statement of her own, which is insufficient to defeat summary judgment. Accordingly, Supreme Court, Queens County, granted summary judgment in favor of the defendants.

For more information about *Nertha Delarosa v. City of New York, Broadway Crescent Realty Inc. and M&N Management Corp.*, or other negligence cases contact Leonard Kamlet [lkamlet@agfjlaw.com](mailto:lkamlet@agfjlaw.com) or Bryan Goldstein at [bgoldstein@agfjlaw.com](mailto:bgoldstein@agfjlaw.com)

#### **AGF&J obtains summary judgment based upon plaintiff's failure to prove "serious injury" as required by Insurance law Section 5102(d)**

Dennis J. Monaco obtained summary judgment in favor of AGF&J client based upon plaintiff's failure to satisfy the

definition of a “serious injury” within the purview of Insurance Law 5102(d), which requires that the plaintiff sustain a “serious injury” as defined by the statute in order to maintain a cause of action for negligent operation of a motor vehicle. In the case of *Texidor v. Jose Ventura, et al.*, Judge Mitchell J. Danziger, Civil Court, Bronx County, found that AGF&J client, Jose Ventura, made a *prima facie* showing of entitlement to summary judgment on the basis that plaintiff did not sustain a serious injury within the meaning of Insurance Law, Section 5102(d). Defendant offered proof of absence of a serious injury to the plaintiff based upon the affirmations of orthopedist, Dr. Robert Israel, and neurologist, Dr. Daniel J. Feuer, who concluded that the plaintiff had no evidence of disability.

The Court opined that the plaintiff presented no evidence of medical treatment from November, 2000 through July 31, 2007, a gap of six and a half years. Plaintiff also did not present proof in admissible form demonstrating a serious injury within the meaning of the Insurance Law. The lack of any admissible evidence contemporaneous with the accident resulted in the inability of the plaintiff to illustrate a medically defined injury resulting from this incident more than six (6) years earlier and the case was dismissed.

For more information about *Texidor v. Jose Ventura, et al.*, contact Dennis Monaco at [dmonaco@agfjlaw.com](mailto:dmonaco@agfjlaw.com)

**AGF&J obtains summary judgment in case where decedent's estate unable to establish AGF&J client was involved in the accident which resulted in decedent's death**

Dennis Monaco obtained summary judgment in the case of *Cuevas v. Arizona Beverage Company*, pursuant to CPLR 3212, in favor of AGF&J client, Diocesis Fermin, on the grounds that plaintiff failed to submit any evidence that Mr. Fermin was involved in the fatal accident involving plaintiff's decedent.

Plaintiff's decedent was allegedly struck by an Arizona Beverage Company truck at the intersection of Arion Place and Beaver Street in Brooklyn, New York. Plaintiff alleged the occurrence took place on August 18, 2003 at approximately 5:18 p.m. Plaintiff's counsel named 29 individual defendants, plus three additional “JOHN DOE” defendants, all of whom were alleged to have been the operators of the single truck that allegedly struck the plaintiff's decedent.

Defendant introduced evidence *via* Affidavit and sworn deposition testimony that amply demonstrated that AGF&J's client could not have been involved in this accident since he had returned his truck to the Arizona Beverage Company Depot prior to the alleged occurrence and he did not operate his vehicle at the intersection on the date of the accident. Plaintiff's counsel did not offer any evidence to the contrary. Accordingly, the Court found that no triable issues of fact exist and moving defendant was entitled

to judgment as a matter of law.

For more information on *Cuevas v. Arizona Beverage Company* contact Dennis Monaco at [dmonaco@agfjlaw.com](mailto:dmonaco@agfjlaw.com)

**AGFJ DEVELOPMENTS**

**AGF&J member Dan Friedman called upon to educate FDNY**

- Dan Friedman lectured at the Fire Marshal's Academy of the New York City Fire Department. His topic was the fire insurance policy and the fire insurance claim process. For information and/or materials on this subject, please contact Dan Friedman at [dfriedman@agfjlaw.com](mailto:dfriedman@agfjlaw.com).

**AGF&J member Steven DiSiervi selected to speak on topic of indemnity agreements in the construction industry**

- Steven DiSiervi has been selected to speak at the Harmonie Group Construction Program in Chicago, Illinois in the first week of May, 2008. Steven's presentation will be on the topic of indemnity agreements in the construction context.

**AGF&J associate selected to moderate CLE Program on Business Development Strategies for Women Attorneys**

- Amy N. Davidoff, a member of the Women of the Law Committee of the New York State Bar Association, will act as moderator at an upcoming CLE program in January, 2008. Topics focus on rainmaking, networking and business development strategies for women in the legal profession.

- AGFJ is pleased to announce that Alexandra Kearse has joined the Firm as an associate. Alex graduated from Brooklyn Law School and earned her BA from Emory University. She also clerked at the Firm since 2006.

**PUBLIC EDUCATION SERVICE**

It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

AGF&J's *Cases and Points* is published as a service to our friends and clients. It is only a summary of, or commentary upon, case law and should not be relied upon as authoritative support. Also, the opinions expressed herein are ours, and do not necessarily reflect those of our clients.

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