

Making Full Use of Defenses to *Respondeat Superior*

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Under the doctrine of *respondeat superior*, an employer is responsible for the actions of an employee if it falls within the course and scope of the duties of the employee. Accordingly, an employer will be held liable for the negligence of a delivery driver who rear ends another vehicle, just as a building owner may be liable for damages sustained by a plaintiff who slips on a puddle of water that a building superintendent failed to clean. In certain circumstances, however, the doctrine may be contested in situations where the acts of the employee arguably fall outside the scope of the duties of employment. This is an often underutilized argument that has a considerable amount of legal support, and the Appellate Divisions have a well defined body of case law absolving employers of liability for the actions of employees that are not within the scope of their duties, and are therefore not foreseeable.

Recent holdings by both the First and Second Department have continued to interpret this point of law quite narrowly. For our purposes, these holdings are particularly relevant in instances involving commercial tenants, such as restaurants, whose employees may at times become involved in altercations when attempting to provide for the security of patrons. Conversely, where a building owner is named in a lawsuit seeking damages for injuries inflicted by an employee of a commercial tenant, a defense can frequently be predicated on the ground that the owner was an out of possession landlord that was divested of control of the demised premises. But for the commercial establishment, often a restaurant or bar, the defense in such actions must be predicated on refuting the application of *respondeat superior*.

This area of law is a pertinent consideration for many of our clients. *Respondeat superior* may be alleged in such diverse scenarios ranging from a bouncer who assaults a patron in a bar or restaurant, to a building superintendent accused of sexual assault of a minor tenant. These are claims that often give rise to multiple injuries, including some of a psychological nature, that can be considerably more significant than a common orthopedic or soft tissue injury. In these situations, it is imperative to have a proper understanding of the application of *respondeat superior* by the First and Second Departments, to accurately evaluate liability and the potential exposure of the claim.

As a preliminary matter, it should be noted that not every instance of the use of physical force by the employee of a restaurant, building owner, or other defendant will necessarily be considered to be outside the scope of that employee's duties. The Appellate Divisions employ a rather fact intensive inquiry of the actions of the employee, then apply them to the duties of the employee as they existed at the time. For

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example, the Second Department recently addressed a scenario in which three family members patronizing the defendant's establishment were assaulted and sustained injuries in the course of their visit. ⁱ *Giambruno* is particularly instrumental, as it details the distinction to be made between those using physical force in the course and scope of their employment, and those whose use of force exceeds such scope. After the first plaintiff was assaulted by another unidentified patron, the other two family members attempted to intervene. Upon being instructed to "get them out of here", the bouncers employed by the defendant carried the two plaintiffs outside, and in response to the resistance received, inflicted injuries by throwing, punching and kicking the plaintiffs. The Second Department held that such action on the part of the bouncers could not as a matter of law be considered outside the course and scope of their duties, since the use of force was in response to a direct instruction, and since such physical contact and force is inherent in the bouncer's position.

Giambruno can be contrasted, however, with a number of cases that have found the use of force and violence to be outside an employee's duties as a matter of law. An interesting recent example involved an infant camper at a campground, who opted, on a very dark night, to continuously shine his flashlight in the face of a counselor. ⁱⁱ The counselor responded by throwing his flashlight at the camper, and in so doing, fractured the plaintiff's skull. The Second Department concluded that the counselor's action fell outside the scope of his duties as a matter of law, and therefore declined to apply *respondeat superior* to hold the counselor's employer vicariously liable for the child's damages.

In another recent example, the plaintiff was a tenant in the defendant's building, and asserted a claim for injuries resulting from a ceiling collapse. ⁱⁱⁱ She then attempted to amend the Complaint to assert an additional cause of action under a theory of *respondeat superior*, alleging that the superintendent that inspected the ceiling sexually assaulted her. The Second Department refused to allow the pleading to be amended, since the claim was "patently insufficient" to make out a cause of action of vicarious liability against the building owner. In so holding, the Appellate Division reasoned that the building owner could only be held liable for those acts committed by the superintendent in the scope of his employment. Since the duties of the superintendent dictated by his employer did not include sexually assaulting tenants in the course of repairing ceilings, the motion to amend the Complaint was denied.

Finally, the Second Department examined a matter in which a building superintendent who assaulted a tenant was found to be acting within the course and scope of his duties, and the building owner was found vicariously liable for the assault. ^{iv} Unlike the employees in *Krioutchkova*, *Danko* and *Giambruno*, the superintendent in *Ramos* was responding to a situation in which the tenants were engaged in a rent strike precipitated by the building owner's failure to respond to complaints. While the plaintiff was videotaping an inspection of the building in the proximity of the superintendent, the superintendent assaulted him. The

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Appellate Division reasoned that the cause of the superintendent's anger was the tenants' strike, and the purpose of the assault was to prevent the plaintiff from videotaping the inspection and collecting evidence in support of the tenants' cause. This was found to be an example in which the use of force employed by an individual who does not have explicit or implicit authority to use physical force was in the course and scope of his employment. His intention was to frustrate the tenants' attempt to secure grounds for an abatement or rent. Since this pertained to his employment, the building owner was held vicariously liable for the assault.

As spelled out clearly in *Ramos*, the common theme in these cases involves the distinction between actions taken for personal reasons, and those taken for reasons relating to the employment of the tortfeasor. The bouncers assaulting the plaintiffs were performing a function relating to their employment; it bore no personal motive. Similarly, the superintendent assaulted Mr. Ramos not out of personal animosity, but to protect the interests of his employer. Conversely, the counselor threw the flashlight at the camper because he was personally angered by the camper's action, just as the superintendent who sexually assaulted the tenant had a personal, but most certainly not a professional, purpose for doing so.

This is a distinction that is often overlooked in defending such actions, but it is a recurring theme that invariably provides the basis for the result. Specifically, in order for *respondeat superior* to apply, the actions of the employee must have been taken in the "furtherance of a legitimate business interest" of the employer. That phrase applies uniformly to all cases analyzed above. As shown herein, it has been consistently subjected to a rather narrow interpretation by the Courts, which provides an opportunity for building owners, restaurateurs, and other employers to insulate themselves from the unforeseeable actions of their employees. The "legitimate business interest" coincides closely with a standard foreseeability analysis, as the duty placed on employers by the *respondeat superior* doctrine does not extend so far as to hold employers liable for actions of employees that they should not be expected to take. As such, the bar had a legitimate business interest in removing violent patrons from the premises, as the landlord had a legitimate business interest in forestalling a rent abatement action. Therefore, these instances of violence on the part of employees can lead to vicarious liability, but only when fitting the criteria above.

There is admittedly some gray area, and in such instances, the Courts have generally tilted toward the interests of employers. For example, a Second Department case addressed a claim asserted by the patron of a bar and tavern in Riverhead, who purposely flooded the bathroom due to personal animosity toward the new owner.^v The manager attempted to intervene, and was verbally abused by the plaintiff before he left the premises. At that time, the manager's estranged husband, who was found by the Court to be a "jack of all trades" at the bar, followed the plaintiff outside and assaulted him. The Second Department rejected the argument that the employment status of the husband made the use of force against unruly patrons foreseeable, and reversed a lower Court decision holding that the assault fell within the course and scope of his duties. Specifically, The Appellate Division noted that the assault was not in the furtherance of a

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legitimate business interest, and instead found that the motivation for the altercation was personal.

In evaluating the potential exposure of an insured employer in a claim involving the actions of an employee, it is therefore necessary to determine not only the nature of the employee's conduct and the duties of his employment, but also the interests of the employer itself. This is admittedly a fact intensive analysis that generally requires deposition testimony. However, discovery in such cases frequently lends itself to instances where the application of *respondeat superior* can be refuted on these grounds. If the evidence suggests that the employee's act was committed for some personal motive, then the plaintiff generally will not be able to establish that the employer is vicariously liable for the resulting damages. It is imperative to have a comprehensive understanding of this point of law, in order to assert the most aggressive defense provided by the well established limitations of the doctrine of *respondeat superior*.

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- i. *Giambruno v. Crazy Donkey Bar and Grill*, 65 A.D.3d 119, 885 N.Y.S.2d 724 (2nd Dept. 2009)
 - ii. *Danko v. Forest Lake Camp, Inc.*, 63 A.D.3d 1099, 882 N.Y.S.2d 280 (2nd Dept. 2009)
 - iii. *Krioutchkova v. Gaad Realty Corp.*, 28 A.D.3d 427, 814 N.Y.S.2d 171 (2nd Dept. 2006)
 - iv. *Ramos v. Jake Realty Co.*, 21 A.D.3d 744, 801 N.Y.S.2d 566 (1st Dept. 2005)
 - v. *Schuhmann v. McBride*, 23 A.D.3d 542, 804 N.Y.S.2d 779 (2nd Dept. 2005)

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