Christina D. Horvath, as Administratrix of the Estate of Joseph J. Horvath, Also Known as Joseph Horvath, Jr., et al., Appellants, v L & B Gardens, Inc., et al., Respondents, et al., Defendants. (Index No. 3545/07)

2010-08459

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

89 A.D.3d 803*; *932 N.Y.S.2d 184*; *2011 N.Y. App. Div. LEXIS 8010*; *2011 NY Slip Op 8124

November 9, 2011, Decided

PRIOR HISTORY: *Horvath v. L & B Gardens, 29 Misc 3d 1211A, 2010 N.Y. Misc. LEXIS 4997 (2010)*

HEADNOTES

Employment Relationships--Respondeat Superior--Vicarious Liability--Intentional Tort

COUNSEL: [***1] Godosky & Gentile, P.C., New York, N.Y. (David Godosky, Diane K. Toner, and William Gentile of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York, N.Y. (Gregory S. Katz, Jennifer Oxman, and Nicholas P. Hurzeler of counsel), for respondents.

JUDGES: REINALDO E. RIVERA, J.P., RANDALL T. ENG, ARIEL E. BELEN, LEONARD B. AUSTIN, JJ. RIVERA, J.P., ENG, BELEN and AUSTIN, JJ., concur.

OPINION

[*803] [**184] In an action to recover damages for personal injuries and wrongful death, the plaintiffs appeal from an order of the Supreme Court, Kings County (Schmidt, J.), dated June 29, 2010, which granted the motion of the defendants L & B Gardens, Inc., and L & B Gardens, Inc., doing business as L & B Spumoni Gardens, for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is affirmed, with costs.

[**185] This action arises from a physical altercation between the plaintiff John Kolompar and Joseph J. Horvath, the deceased brother of the plaintiff Christina D. Horvath, on one side, and on the other side, several employees of the defendants L & B Gardens, Inc., and L & B Gardens, Inc., doing business as L & B Spumoni Gardens (hereinafter together L & B), a restaurant [***2] in Brooklyn, New York.

Pursuant to the doctrine of respondeat superior, an employer can be held vicariously liable for torts committed by an employee acting within the scope of employment (*see Fernandez v Rustic Inn, Inc., 60 AD3d 893, 896, 876 NYS2d 99 [2009]*, citing *Judith M. v Sisters of Charity Hosp., 93 NY2d 932, 933, 715 NE2d 95, 693 NYS2d 67 [1999]*). Pursuant to the doctrine, an "employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment" (*Judith M. v Sisters of Charity Hosp., 93 NY2d at 933*). However, "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 at 896*).

Here, the evidence relied upon by L & B in support of its motion was sufficient to establish, prima facie, that L & B could not be held vicariously liable for its employees' intentional torts [*804] under the theory of repondeat superior. L & B's submissions demonstrated that the altercation took place away from its premises after L & B had closed for the evening, and that the altercation arose from personal motives unrelated [***3] to the furtherance of L & B's business interests (*see Schuhmann v McBride, 23 AD3d 542, 542-543, 804 NYS2d 779 [2005]*; *see also Fernandez v Rustic Inn, Inc., 60 AD3d at 896-897*; *Savarese v City of N.Y. Hous. Auth., 172 AD2d 506, 508, 567 NYS2d 855 [1991]*). In opposition, the plaintiffs failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted L & B's motion for summary judgment dismissing the complaint insofar as asserted against it. Rivera, J.P., Eng, Belen and Austin, JJ., concur. **[Prior Case History: *29 Misc 3d 1211(A), 2010 NY Slip Op 51795(U)*.]**