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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NICOLETTA ARVINITES-CROOK, Plaintiff and Appellant, v. GREG MICHAELS, LLC et al., Defendants and Respondents.	B303928 Los Angeles County Super. Ct. No. BC651031

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Affirmed.

R. Timothy O'Connor and Demos P. Anagnos for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffrey A. Miller, Ernest Slome, Matthew S. Pascale, Arezou Khonsari and Tracy Forbath for Defendants and Respondents.

Nicoletta Arvinites-Crook sued Greg Michaels, LLC, Michael Liang, and Gregory Kim for false imprisonment, negligence, negligent hiring, vicarious responsibility, sexual battery, and fraud, alleging she was sexually assaulted by an employee in a spa owned by Greg Michaels, LLC. The trial court granted summary judgment in favor of the defendants, and Arvinites-Crook appeals.

BACKGROUND

Arvinites-Crook filed a first amended complaint July 25, 2018, alleging she entered the Meridian Day Spa inside the Commerce Casino on April 12, 2015. An employee behind the desk, Steven Huerta, told Arvinites-Crook no massage appointments were available, but he would text her if there was an opening. Later, Huerta texted Arvinites-Crook and she returned to the spa. Huerta said he would give her a complimentary massage. Huerta led her into a massage room and sexually assaulted her, causing significant emotional and physical trauma and injuries. Arvinites-Crook alleged causes of action for false imprisonment, negligence, negligent hiring and supervision, vicarious responsibility, sexual battery, and fraud against Greg Michaels, LLC (which owned the spa, and which we refer to as Greg Michaels) and Michael Liang and Gregory Kim (the owners of Greg Michaels) (collectively, defendants).[1]

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[1] The first amended complaint named as defendants Meridian Day Spa, Greg Michaels, LLC, Greg Michaels, Huerta, Commerce Casino, and Doe defendants. No individual named Greg Michaels is associated with the LLC, which is named for Gregory Kim and Michael Liang. Arvinites-Crook designated Michael Liang and Gregory Kim as Doe defendants in an amendment to her complaint. Huerta defaulted, and Commerce Casino and Meridian Day Spa were dismissed.

The defendants filed a motion for summary judgment or summary adjudication in July 2019. Arvinites-Crook filed a motion for summary adjudication, opposed the defendants' motion, and made evidentiary objections. The defendants opposed Arvinites-Crook's summary adjudication motion, and made their own evidentiary objections.

On November 22, 2019, the court held a hearing on the motions after issuing a tentative ruling granting the defendants' motion. Following argument, the court took the matter under submission, in part to watch a surveillance video submitted by Arvinites-Crook.

On December 3, 2019, the trial court filed a ruling granting the defendants' motion (and denying Arvinites-Crook's motion). The court concluded the defendants were not vicariously liable for Huerta's sexual assault, because the act was outside the scope of his employment. The defendants were not liable for negligent hiring. Huerta's sexual misconduct was not foreseeable, as it was undisputed the Los Angeles County Sheriff's Department (LACSD) conducted the background check required under the spa's lease agreement with the casino, LACSD approved his work permit, and no additional background check was required. As for negligent supervision, the defendants had received no complaints

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In support of her motion for summary adjudication, Arvinites-Crook argued Kim and Liang operated Greg Michaels, LLC and the spa as their alter ego. She does not raise this issue on appeal. The defendants raise the issue in their respondent's brief. Given our affirmance of the summary judgment in favor of the defendants, it is immaterial whether Kim and Liang are personally liable to Arvinites-Crook, and we do not address the issue.

about Huerta and had no incidents of sexual assault since they began operating the spa in 2013. They therefore lacked notice that they needed to increase their supervision of Huerta's janitorial work or of his limited coverage of the reception desk. The court declined to rule on both parties' evidentiary objections, noting Arvinites-Crook's objections were "improperly directed at the separate statement, and not at defendants' evidence." The court entered judgment on December 11, 2019, and Arvinites-Crook filed a timely notice of appeal.

DISCUSSION

The trial court properly granted summary judgment

Arvinites-Crook argues the trial court erred in granting summary judgment on her third cause of action (negligent hiring and negligent supervision) and her fourth cause of action (vicarious responsibility/respondeat superior).

"The pleadings identify the issues to be considered on a motion for summary judgment." (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1210 (*Federico*).) On appeal from a grant of summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law, considering all the evidence set forth in the moving and opposition papers. (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) We liberally construe evidence presented in opposition to a summary judgment motion, and we resolve any doubts in favor of the party opposing the motion. (*Ibid.*) A defendant seeking summary judgment must show the plaintiff cannot establish at least one element of the cause of action. (*Ibid.*) Summary judgment is appropriate if no triable issue of material fact exists, and the moving party is entitled to judgment as a matter of law. (*Ibid.*)

a. *Negligent hiring*

Arvinites-Crook alleged the defendants were negligent when they hired Huerta because Greg Michaels knew or should have known "Huerta was morally unfit to work as a manager or masseur." The trial court concluded it was undisputed the defendants required Huerta to submit to the standard casino background check before they hired him as a spa attendant, the sheriff's department approved his work permit, and no admissible evidence established the defendants were required to do additional investigation. We agree.

A defendant employer may be liable for negligent hiring if it "knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843.) An employer who fails to exercise due care in selecting an employee for the job to be done will be liable not because of the employer-employee relationship, but because "the employer knows, or should [have] know[n], facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons *in light of the particular work to be performed.*" (*Federico*, *supra*, 59 Cal.App.4th at p. 1214.) "[A]n employer's liability must be determined in the context of the specific duties the work entails." (*Id.* at p. 1215.)

It was undisputed defendants hired Huerta not as a manager or masseur, but as a spa attendant. His specific duties were to clean the spa, make sure there were clean towels in the rooms, do the laundry, and cover the reception desk when the receptionist stepped away. As an attendant, he was not

authorized to offer free services, and was not allowed to enter a massage room when a client was present.

What did the defendants know? They knew that in October 2014 Huerta stated on his application to work as a spa attendant that he had not been convicted of any offense other than a traffic violation. They knew he received a casino work permit after the required background check by LACSD. The forms for the Los Angeles County Casino Work Permit required the applicant to attend an interview, provide identification, be fingerprinted, and list all arrests and dispositions (no matter how old, and even if charges were dropped, dismissed, or expunged). LACSD would conduct a background check for wants and warrants, do a fingerprint check with the California Department of Justice (DOJ) and the FBI, and verify the applicant's legal right to work in the United States. If the work permit was approved, the spa would receive a permit for the worker and go ahead with the hire; if not, the spa would receive a rejection letter. The spa would not receive the completed and signed application for the work permit, but only the permit itself. The spa received Huerta's work permit in October 2014. The defendants knew Huerta denied any convictions other than traffic offenses, and he had passed the LACSD background check and received a permit to work in the spa inside the casino.

Were the defendants required to conduct a more extensive background investigation than was required to work in the casino? Arvinites-Crook points to the deposition testimony of her proposed security expert, Tyrone Berry, to argue the defendants should have made a more thorough check for this "sensitive" position at a spa inside the casino. But Berry testified the defendants reasonably relied on the issuance of the permit

to assume Huerta had passed the standard background check. Most importantly, when asked if the standard of care in the spa industry was "to go above and beyond" the live scan and DOJ check involved in the sheriff's background investigation, Berry admitted he could not say: "I do not know the standard. The industry standard." He added it was only his personal opinion the defendants should have done a more thorough background check. As the trial court noted, Berry therefore was not qualified to testify as an expert that because they operated a spa, defendants should have done more investigation before hiring Huerta for the attendant position.[2]

Arvinites-Crook argues "an adequate background check would have revealed that Huerta was a dangerous criminal with numerous arrests and/or convictions for domestic violence and terrorist threats against women like his former girlfriend Melody M.," and defendants would not have hired him had they known of his "violent past." In support of Arvinites-Crook's motion for summary adjudication, she attached arrest records and criminal history records for Huerta from the sheriff's department and from the Los Angeles Police Department. The exhibits showed arrests

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[2] Arvinites-Crook argues the trial court improperly weighed Berry's evidence, but Berry's own admission that he was not familiar with the spa industry standards belies this claim. Without any description of the standard of care for hiring in the spa industry, and what additional investigation was required to meet it, his testimony (including his suggestion the defendants were negligent for not installing panic buttons in the massage rooms) was legally insufficient to defeat summary judgment. (*Doe v. Good Samaritan Hospital* (2018) 23 Cal.App.5th 653, 656, 664-665.)

in 2011, 2012, 2013, and 2014 for abuse of a cohabitant (Melody M.). The 2014 arrest resulted in a misdemeanor conviction.[3]

Huerta also named Melody M. as a reference on his job application, and Arvinites-Crook argues the defendants were negligent when they did not interview her (and so discover his arrests for domestic abuse). When Arvinites-Crook deposed Melody M., she testified she had lived with Huerta but no longer talked to him, and she did not remember the reports she had made against him. Melody M. knew Huerta always listed her as a reference when he applied for jobs, but the spa did not contact her. If she had been contacted, she would have said Huerta was a good, dependable, and hard worker. She would never have told a prospective employer about domestic abuse, because it had nothing to do with Huerta's job. Melody M. minimized the abuse. She testified she did not think Huerta was a threat to women and did not believe he would rape anyone.

The trial court properly granted summary judgment in favor of the defendants on Arvinites-Crook's negligent hiring cause of action. No admissible evidence demonstrated the defendants were required to conduct an additional background check before hiring Huerta as a spa attendant. We do not discount the seriousness of his arrests for cohabitant abuse of Melody M. But the undisputed evidence showed the particular duties Huerta would perform as a spa attendant were confined

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[3] The exhibits included the following arrests and one conviction for cohabitant abuse (Pen. Code, § 273.5, subd. (a): a July 2011 police report of Huerta's arrest, in which Melody M. described Huerta hitting her with her cell phone and his fist; an August 2012 arrest; an August 2013 arrest; a July 25, 2014 arrest; and a misdemeanor conviction dated July 28, 2014.

to janitorial work and occasional coverage of the front desk, and in light of these limited duties, knowledge of his arrests would not have warned a reasonable prospective employer he presented an undue risk of harm to third persons such as Arvinites-Crook. (See *Federico*, *supra*, 59 Cal.App.4th at pp. 1214-1215.) And it was undisputed that if the defendants had contacted Melody M. as a listed reference for Huerta, she would not have revealed his arrests for cohabitant abuse.

b. *Negligent supervision*

Arvinites-Crook's related claim for negligent supervision alleged the defendants also harmed Arvinites-Crook by their negligent supervision of Huerta. The trial court concluded no facts showed the defendants could have foreseen Huerta would commit sexual misconduct at the spa, and they had received no complaints about Huerta and no complaints of sexual assault by anyone since they began operating the spa. As they had no notice of an enhanced risk to spa customers and incurred no duty of additional supervision over Huerta's work, they therefore were not liable for negligent supervision. Again, we agree.

"To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902.) " 'Liability is based upon the facts that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 264.) In *Alexander*, the plaintiffs alleged that if the employer defendant had conducted a thorough background check, the employer would have discovered the employee had a history

of sexual harassment at prior jobs. Once hired, the employee began to harass employees and the defendant should have known of his improper behavior. (*Id.* at p. 265.) But no evidence showed the hospital was on *prior* notice of the misconduct, as no evidence showed any bad acts *after* the hospital received reports he had created a hostile work environment. (*Ibid.*)

We have already concluded that at the time the defendants hired Huerta they knew of no facts showing Huerta had the propensity or disposition to commit sexual assault, and that they had no duty to do an additional background investigation. And even if his arrests "could be deemed a warning sign that [Huerta's] continued employment might pose a risk" of sexual assault on spa customers (which we have concluded they could not), "they cannot be used to impose liability for negligence on defendant[s], who had no actual knowledge, or reason to suspect, that they had occurred." (*Federico*, *supra*, 59 Cal.App.4th at p. 1216.) Finally, just as there was no evidence the defendants knew Huerta posed a risk when he was hired, there was no evidence they knew he was a risk six months later, at the time he committed the assault. It is undisputed the defendants had received no complaints about Huerta, and also had no knowledge of any sexual misconduct by anyone at the spa.

Huerta was supervised by the receptionists and the massage therapists, but when he did his janitorial work (deep cleaning or laundry) he would be gone for hours at a time. Although Arvinites-Crook argues the defendants should have monitored Huerta continually, she does not explain why moment-to-moment supervision was required for his duties as a spa attendant. In the absence of any facts showing the defendants had prior knowledge that Huerta posed

a risk of sexual assault, summary judgment on the negligent supervision claim was proper.

Arvinites-Crook criticizes the trial court's failure to watch a surveillance video from the day of Huerta's sexual assault. But as the trial court explained, it did not receive the video until after the summary judgment hearing. Although Arvinites-Crook lodged the video in two different formats, the court was unable to access the files with the video footage. The court ruled without reviewing the footage, but gave "full credence" to Arvinites-Crook's description of the footage. The footage, as described by Berry, showed Arvinites-Crook entering the spa and meeting Huerta, who opened the door to a massage room. Huerta exited, closed the curtain, looked down the hall, and went back inside. He and Arvinites-Crook were in the massage room for more than 30 minutes. Huerta again briefly exited, opened the door, and took Arvinites-Crook to a freight elevator and then to the lobby. Arvinites-Crook does not explain how her expert's description of the video footage was inaccurate or inadequate, and we see no error by the trial court.

c. *Vicarious responsibility/respondeat superior*

In addition to claiming the defendants were directly liable for their own conduct in negligently hiring or supervising Huerta, the complaint alleged in its fourth cause of action they were vicariously liable for Huerta's sexual assault. The defendants' motion moved for summary adjudication of Arvinites-Crook's causes of action for false imprisonment, vicarious responsibility, sexual battery, and fraud, all of which depended on the rule of respondeat superior: "[A]n employer is vicariously liable for the torts of its employees committed within the scope of the employment." (*Lisa M. v. Henry Mayo Newhall Memorial*

Hospital (1995) 12 Cal.4th 291, 296 (*Lisa M.*).) The trial court concluded respondeat superior liability did not apply to make defendants vicariously liable for Huerta's sexual assault. We agree.

"[A]n employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M.*, *supra*, 12 Cal.4th at pp. 296-297.) But "the employer will not be held liable for an assault or other intentional tort that did not have a causal nexus to the employee's work." (*Id.* at p. 297.) It is not enough "the employment brought tortfeasor and victim together in time and place"; the tort must be engendered by, or be an outgrowth of, the employee's duties, and the act must be "intended to serve the employer in some way." (*Id.* at p. 298.)

In *Lisa M.*, an ultrasound technician employed by a hospital sexually molested a patient. (*Lisa M.*, *supra*, 12 Cal.4th at p. 295.) But it was not enough for respondeat superior liability that the technician's employment brought the tortfeasor in contact with the victim, even though the job duties involved physical touching. (*Id.* at p. 302.) *Lisa M.* asked whether the tort was generally foreseeable from the employee's duty, so that the employment predictably created the risk of intentional torts of the type for which liability is sought. (*Ibid.*) Nothing about an ultrasound exam would be expected to give rise to sexual exploitation. Instead, "[the] technician simply took advantage of solitude with a naïve patient to commit an assault for reasons unrelated to his work. . . . [His] decision to engage in conscious exploitation of the patient did not *arise out of* the performance of the examination, although the circumstances of the examination

made it possible." (*Id.* at p. 301.) And "that a job involves physical contact is, by itself, an insufficient basis on which to impose vicarious liability for a sexual assault." (*Id.* at p. 302.) Respondeat superior liability applies only to injuries that " ' " 'as a practical matter are *sure to occur* in the *conduct of the employer's enterprise*.' " ' [Citations.] 'Sure to occur' is far removed from 'incident to,' " and "a causal 'incident to' relationship would necessarily *not* be enough for respondeat superior liability." (*Z.V. v. County of Riverside*, *supra*, 238 Cal.App.4th at p. 899.)

Here, the sexual assault was not generally foreseeable from Huerta's duties as a spa attendant. Nothing about cleaning massage rooms when no clients were inside, laundering towels, and occasionally substituting at the front desk, created the risk of sexual assault. Unlike the job of the ultrasound technician in *Lisa M.*, none of these duties involved physical touching of the clients. Huerta simply took advantage of an unsuspecting client to commit an assault for reasons unrelated to his work. His decision to assault Arvinites-Crook did not arise out of the performance of his job duties, although the circumstances of his employment made it possible. "The assault, rather, was the independent product of [Huerta's] aberrant decision to engage in conduct unrelated to his duties. In the pertinent sense, therefore, [Huerta's] actions were not foreseeable from the nature of the work he was employed to perform." (*Lisa M.*, *supra*, 12 Cal.4th at p. 303.)

The trial court properly granted summary judgment on the remaining causes of action based on respondeat superior liability.

d. *Evidentiary objections*

Arvinites-Crook argues the court had a duty to rule on her evidentiary objections. But as the court pointed out, her evidentiary objections were improperly directed at the defendants' separate statement rather than at the supporting evidence, and she does not address this issue in her briefing on appeal. We see no abuse of discretion.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents Greg Michaels, LLC, Gregory Kim, and Michael Liang.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN. J.