

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ELAINE SLOBOD, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----x
DARREN TERRY and DIANNE TERRY,

Plaintiffs,

-against-

RAYMOND VANACORE and ANTHONY
SPALETTA,

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

(Action No. 1)

Index No. 1646/2007
Motion Date: Jan. 7, 2009

-----x
RAYMOND VANACORE,

Third-Party Plaintiff,

-against-

1055 UNION AVE. REALTY CORP. d/b/a
RAMADA INN OF NEWBURGH and GEORGE T.
CLOONEY,

Third-Party Defendant.

-----x
RAYMOND VANACORE and DEANNA VANACORE, (Action No. 2)

Plaintiffs,

-against-

Index No. 8659/2007

1055 UNION AVE. REALTY CORP., d/b/a
RAMADA INN OF NEWBURGH, GEORGE T.
CLOONEY, DARREN TERRY and DIANNE
TERRY,

Defendants.

-----x

(Caption continued on the next page)

-----x
ANTHONY SPALETTA, (Action No. 3)

Plaintiff, Index No. 2266/2008

-against-

1055 UNION AVE. REALTY CORP. d/b/a
RAMADA INN OF NEWBURGH, GEORGE T.
CLOONEY, DARREN TERRY and DIANNE
TERRY,

Defendants.
-----x

The following papers numbered 1 to 36 were read on this motion by defendant 1055 Union Ave. Realty Corp. d/b/a Ramada Inn of Newburgh for summary judgment dismissing the complaint (Actions 1, 2 & 3); this motion by defendants Darren Terry and Dianne Terry for summary judgment dismissing the complaint (Actions 2 & 3); this motion by defendant George T. Clooney for summary judgment dismissing the complaint and third-party complaint (Actions 1, 2 & 3) and this motion by Darren Terry and Dianne Terry for partial summary judgment on the issue of liability against defendant Anthony Spaletta with respect to a cause of action for battery (Action No. 1):

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Upon the foregoing papers it is ORDERED that the motion of defendant George T. Clooney is granted, complaint and third-party complaint dismissed to him; the motion by defendants Darren Terry and Dianne Terry for summary judgment dismissing the complaints against them is granted; the motion by defendant 1055 Union Ave. Realty Corp. is denied; and the motion by Darren Terry and Dianne Terry as plaintiffs for partial summary judgment against defendant Anthony C. Spalletta is denied. It is further ORDERED that the actions and third-party action are severed as to the remaining defendants.

These actions concern a physical altercation which occurred in the evening of February 24-25, 2006 at premises owned by defendant 1055 Union Ave. Realty Corp. d/b/a Ramada Inn of Newburgh (hereinafter "the Ramada Inn"). At the time of this incident, a portion of the cast and crew of the Warner Brothers motion picture "Michael Clayton"¹ was staying at the Ramada Inn to film some scenes in the motion picture in this county. Among them was defendant George T. Clooney (hereinafter "defendant Clooney") who played the title role.

Also present in the Ramada Inn that night were parties Raymond Vanacore (hereinafter "Vanacore") and Anthony Spalletta (hereinafter "Spalletta"), Orange County residents, who were not staying at the hotel, but had gone to the bar for a few drinks late in the evening. They had parked in an area near a side entrance to the hotel to gain

¹ (see generally <http://michaelclayton.warnerbros.com/#> [viewed January 21, 2009]).

access to the bar. Their attempt to return to their car led them to cross paths with Clooney and his party and the physical altercation which is the subject of these actions.

That evening, defendant Clooney and his personal staff members Giovanni and Waldo went out to dinner at a restaurant which was nearby but not on the premises of the Ramada Inn. Waldo had invited three women whom he knew and who lived locally to join them. After dinner, the six returned to the Ramada Inn between 11:30 p.m. and midnight. They intended to enter the restaurant and bar on the Ramada Inn premises.

Defendant Clooney testified at his deposition that upon looking into the bar he found that it was too crowded for his liking and decided to go to his room and to bed. At that point, Darren Terry and Dianne Terry proceeded to escort him across the lobby. During the walk, Darren Terry told defendant Clooney that he and his wife had written a book about their experiences as police officers. Defendant Clooney testified, however, that at the time of this conversation he did not know that the Terrys had been hired by the Ramada Inn as security personnel, although he suspected that Dianne Terry had been. His personal bodyguard, Giovanni, had previously been introduced to the Terrys and knew who they were and their function in the hotel. Defendant Clooney went through a set of double doors and waited for one of the women who had been to dinner with him that night to emerge from the lavatory so he could say "good night" to her. According to Darren Terry, Giovanni signaled for the

Terrys to accompany them.

Meanwhile, Vanacore and Spalletta testified that they had no idea that defendant Clooney was staying in the hotel when they decided to go to the bar. They first became aware of the fact when they saw him in the lobby through the glass doors of the barroom. There was a commotion as people went out of the bar to see him. The two had been ready to leave the bar, but decided to wait until the commotion died down and ordered another beer. They saw defendant Clooney leave the area, walking in the direction from which they had entered the bar initially, toward the double doors behind which defendant Clooney was waiting to say good night to his female dinner companions. After a short time, they decided to leave for the night, heading to their car through the area behind the double doors where Clooney and his party were waiting to a side entrance closer to their car than the main doors off the hotel lobby. This side entrance to the hotel was one they used to enter the hotel. It appears from deposition testimony that this entrance was only supposed to be available to persons staying in the hotel who were to gain admission by using a key card. On the night in question at least, however, it appears that the door was left unsecured.

As the friends tried to push the double doors open, Darren Terry leaned against them to prevent them from opening further. Darren Terry told the two men that they could not proceed through the doors. The two questioned Darren Terry's authority to deny them access to the area. Defendant Clooney testified that he and Giovanni

told Terry not to block the door. A verbal altercation escalated into a physical one, and Giovanni, whom defendant Clooney sometimes employed as a personal bodyguard, told defendant Clooney to get away from the area so he went upstairs along with other members of his party. Defendant Clooney then proceeded back down the stairs to look for Giovanni as he heard a fight going on. He saw Giovanni in the middle of an altercation trying to break up the fight. He then saw people coming at Giovanni so he proceeded back down the stairs, he testified, to tell Giovanni to get out of there. Waldo followed him. Giovanni grabbed defendant Clooney and told him to go back upstairs. Defendant Clooney exchanged words with Raymond Vanacore. He observed Darren Terry throwing punches at Anthony Spalletta. Defendant Clooney then went upstairs to his room.

A video taken by a surveillance camera, shows defendant Clooney initially tripping off the staircase into the area where the altercation occurred as he went back downstairs and then being restrained from entering the melee by what appears to be his staff. According to deposition testimony, Raymond Vanacore and/or Anthony Spalletta used expletives aimed in his direction because they thought their access to their automobile was being blocked at defendant Clooney's behest. It is not alleged by any party that defendant Clooney made physical contact with the other parties other than Raymond Vanacore's impression that Clooney may have pulled his hair.

After defendant Clooney's exit from this scene, the violence escalated.

According to Vanacore, Darren Terry pushed him down another set of steps to the exterior door and began to choke him. Dianne Terry asked her husband to stop. Vanacore punched Darren Terry. Vanacore called for Spalletta who had remained on the landing above and saw Darren Terry then go the landing and punch Spalletta in the face. Spalletta hit Terry with his knee. Dianne Terry opened the exterior door and told Spalletta to just get out of the building. Vanacore yelled to Spalletta to join him in leaving the building.

After Vanacore reached the parking lot, he testified, the bartender, "Bob", followed him and assaulted him by punching and kicking him. Darren Terry then emerged from the building with a handgun drawn. According to Vanacore, Darren Terry stated, "I'm going to blow your f__kin' brains out" (Deposition Transcript of Raymond Vanacore, dated April 29, 2008, p. 137). Darren Terry held the gun against his face just below his nose and further stated that he was a police officer. Vanacore replied "now you tell me" (Id. at 138). Darren Terry was bleeding from the nose. He forced Vanacore to the ground, got on top of him and handcuffed him. He then held the gun again to Vanacore's head and stated, "I should blow your f__kin' head off" (Id. at 141). Vanacore asked Darren Terry to put his gun away inasmuch as he had been handcuffed. He saw Darren Terry hold the gun to Spalletta's head as well. After several minutes, the Town of Newburgh Police arrived at the scene and placed him in their squad car. He was charged with assault and pleaded guilty to disorderly conduct in the Town of Newburgh Justice Court in

disposition of the charge or charges.

Spalletta testified at his deposition that when Vanacore tried to go through the double doors off the lobby Darren Terry grabbed Vanacore "immediately" (Deposition Testimony of Anthony Spalletta, dated May 2, 2008, p. 60) stating "get the f__k out of here" (Id. at 62). According to Spalletta, Darren Terry began throwing punches. Spalletta told Darren Terry to leave his friend alone. Darren Terry responded "f__k you" (Id. at 65). Dianne Terry, meanwhile, was yelling at her husband, asking him to stop engaging Vanacore. Spalletta grabbed Darren Terry from behind and tried to pull him off Vanacore. Spalletta warned Darren Terry that if he did not release Vanacore Spalletta would knee him in his ribs. Spalletta then did so. Darren Terry then came after Spalletta and punched him. Spalletta then observed defendant Clooney coming down the stairs. He heard Vanacore say "is this what this is all about... George Clooney" (Id. at 72). Defendant Clooney became "livid" (Id.) and said "[f]__k you, mother f__ker, I got nothing to do with this" and "with a look of rage on his face.. he proceeded to run down the steps as fast as he could" (Id.) He then testified that defendant Clooney tripped and his bodyguards got him to his feet and restrained him as he attempted to come after Spalletta and Vanacore. Bob the bartender then grabbed Spalletta from behind and told him to calm down. Vanacore and the Terrys went down the staircase outside and Bob released him. He went outside and saw Vanacore standing in the parking lot. Bob the bartender came out of the building and kicked Vanacore inside his

thigh and began to punch him. Bob then returned to the building. Shortly thereafter, Darren Terry came out screaming with a pistol drawn and ordered Vanacore to get on the ground. Dianne Terry pleaded with Spalletta to get in his car. He said he was not leaving without his friend. He then saw Darren Terry handcuff Vanacore. Dianne Terry continued to entreat him to leave the area. He then saw Darren Terry put the gun to Vanacore's head. After a short time, Darren Terry ran across the parking lot to Spalletta with the gun drawn and hit him in the head with the pistol. Darren Terry said, "you know, ... you kicked me, I should blow your f__kin head off" (Id. at 96). Spalletta testified that Darren Terry said, "[y]ou don't know who I am, I'm a cop". Spalletta replied, "well, it's nice for you to finally tell us that now" (Id.). The police arrived, and Spalletta was arrested along with Vanacore. He later pleaded guilty to disorderly conduct.

Darren Terry testified at his deposition that he had been a City of Newburgh Police Officer for fifteen years, but had received a disability pension as a result of job related disabilities. His wife, Dianne Terry was a retired New York State Trooper. She was working part-time as a security agent at the Ramada Inn. She knew the Assistant Manager there, Josephine Formisano, because Ms. Formisano's son was a Newburgh police officer and knew Darren Terry. He began to work at the Ramada Inn as well in 2005. He stated that Vanacore provoked the incident by trying to push his way by Terry after Terry told him that the area behind the double doors was

temporarily closed and that he was a member of the hotel's security force. Terry said that Vanacore grabbed him and pushed him backwards. After the initial confrontation, Terry tried to calm Vanacore down. When they reached the exit from the building, he told Vanacore to leave. Vanacore started to go out the door, but abruptly turned and punched Terry in the nose, breaking it.

The Terrys, Vanacore and his wife, plaintiff Deanna Vanacore, and Spalletta commenced actions to recover, *inter alia*, damages for personal injuries they sustained in the altercations.

Defendant Clooney, the Ramada Inn and the Terrys move for summary judgment dismissing all claims against them. The Terrys also move for partial summary judgment on the issue of liability with respect to their cause of action against Spalletta sounding in battery.

THE MOTION OF THE RAMADA INN

The Ramada Inn argues that it is not liable for any tort of the Terrys under the doctrine of *respondeat superior* since the Terrys were independent contractors and not the Ramada Inn's employees (see generally Kleenman v Rheingold, 81 NY2d 270 [1993]).

There are exceptions to that rule, however, which are applicable here. A principal can be held vicariously liable for the acts of an independent contractor if it is negligent in selecting, instructing or supervising the independent contractor or where the independent contractor is hired to do work which is inherently dangerous (see Adams v Hilton Hotels, Inc., 13 AD3d 175 [2004]).

Moreover, an employer may be liable in *respondeat superior* for the intentional torts of an employee if the employee was acting within the scope of the employment at the time of the commission of the tort (see Riviello v Waldron, 47 NY2d 297 [1979]; Sims v Bergamo, 3 NY2d 531 [1957]; Ramos v Jake Realty Co., 21 AD3d 744 [2005]). "The doctrine is premised on a notion that the employer 'is justly held responsible when the servant through lack of judgment or discretion or infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty and authority, and inflicts an unjustifiable injury upon another'" (Ramos v Jake Realty Co., *supra* at 745, quoting De Wald v Seidenberg, 297 NY 335, 338 [1948]).

Here, the Ramada Inn failed to provide any training to the Terrys, failed to give them a uniform despite corporate directive attached to the Ramada Inn's own motion, stating "[s]ecurity personnel should be in proper uniform attire that clearly defines your presence. White button down security shirt, shield, black pants" (Exhibit Q). Had it been clear from the start that the Terrys were security officers, Vanacore and Spalletta may have not questioned their authority to block their path. Neither individual produced by Ramada Inn for deposition seemed aware that the Terrys were carrying firearms, nor that the key card safeguard for the side entrance to the hotel was disabled and that bar patrons were using that entrance to access the bar and restaurant area. As noted below, there is no indication in this record that Dianne Terry was a

participant in an intentional tort. As to Darren Terry, the Ramada Inn argues that an intentional tort he committed was outside the scope of the employment. In that regard, the Ramada Inn relies upon cases where a subway passenger was attacked and choked by a token booth clerk after the passenger asked directions to 34th Street (Adams v New York City Transit Auth., 211 AD2d 285 [1995]) or where a security guard bit off part of a person's ear for reasons which had nothing to do with the security guard's duties (Boyd v Fulton Terrace Associates, 11 Misc3d 144 [U], 2006 WL 1173614, 2006 NY Slip Op. 50795)². Here, however, Darren Terry was hired to assist the hotel in maintaining defendant Clooney's privacy and safety during his stay at the hotel and there is an issue of fact as to whether any overly aggressive act he committed that evening was within the scope of an employment (see Sims v Bergamo, supra).

The Ramada Inn, unlike the Terrys (see infra) did not plead a limitations defense in its answers or the third-party answer (see Lipman v Vebeliunas, 39 AD3d 488 [2007]).

The Ramada Inn has failed to establish an entitlement to summary judgment.

THE MOTION OF DARREN TERRY AND DIANNE TERRY TO DISMISS

The incident at issue concluded on February 25, 2006. The statute of limitations for the intentional torts of assault and battery ran on February 25, 2007. The Vanacores action against the

² This decision by the Appellate Term, First Department is not officially reported.

Terrys was commenced by filing on September 12, 2007. The Spalletta action against the Terrys was not filed until 2008. The complaints allege causes of action predicated upon Darren Terry's physical confrontation with both Vanacore and Spalletta. Despite the attempt to characterize the cause of action against the Terrys as "negligence" and couch it in those terms the complaints sound in assault and battery and are time barred as to the Terrys (see Hernandez v State, 39 AD3d 709 [2007]; Allstate Ins. Co. v Schimmel, 22 AD3d 616 [2005]; Schetzen v Robotsis, 273 AD2d 220 [2000]).³

**THE MOTION BY DARREN TERRY AND DIANNE TERRY FOR SUMMARY JUDGMENT
ON THE ISSUE OF LIABILITY AGAINST DEFENDANT SPALLETTA**

This motion by the Terrys is predicated upon the fact that Spalletta warned Darren Terry that if he did not release Vanacore Spalletta would kick Darren Terry and that he did, in fact, do so.

A defense to the tort of battery is justification. Defense of a third person justifies battery and may even justify homicide provided the force used does not exceed the necessity of the situation (see generally 1 NY PJI3d 3:3 at 13-14 [2009]). Under the facts of this case the court finds a triable issue of fact in this regard which precludes summary judgment in the Terrys' favor.

³ If the actions were timely commenced, the court notes that there is no indication in the record that Dianne Terry did anything but attempt to end the altercation and the court would dismiss the actions against her on this alternative ground.

THE MOTION OF DEFENDANT CLOONEY

The causes of action against defendant Clooney are predicated upon the assumed fact by the pleader that the Terrys were his employees. Through pre-trial disclosure, we now know that such is not the case. Although argument is made that because Giovanni met the Terrys he supervised them there is no evidence to support this assertion either. Accordingly, so much of the claims against defendant Clooney which seek recovery from him for Darren Terry's acts on a *respondeat superior* theory must be dismissed and the court rejects as a matter of law the rather strained analysis urged which would deem the Terrys defendant Clooney's "special employees" for scant minutes one evening because they accompanied him across a lobby to an area, even at Giovanni's behest, and remained there with him.

There are also arguments that defendant Clooney committed the tort of negligent infliction of emotional distress. In order to successfully maintain such a cause of action, the parties asserting it are required to prove that the conduct complained of was so outrageous in character and extreme in degree that it surpassed the limits of decency and would be regarded as atrocious and utterly intolerable in a civilized society (see Tartaro v Allstate Ins. Co., 56 AD3d 758 [2008]; Chime v Sicuranza, 221 AD2d 401 [1995]). Under no view of this record could defendant Clooney's actions be so characterized.

Finally, argument is made under the general parameters of

negligence that somehow defendant Clooney breached a duty to the other parties by returning down the stairs and becoming visibly angry when epithets were made in his direction. Becoming angry is not tortious conduct.⁴ The parties offer no authority for the proposition that defendant Clooney owed them a duty not to enter an area where his personal bodyguard was involved in an altercation and the court is aware of none.

This matter is scheduled for status conference on February 19, 2009 at 9:15a.m. at the Orange County Courthouse, Courtroom 12, 255 Main Street, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: January 30, 2009
Goshen, New York

E N T E R


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⁴ The parties have not alleged causes of action against defendant Clooney for common law assault (see generally 1 NY PJI3d 3:2 [2009]). As an intentional tort a cause of action sounding in that tort would now be time barred.

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