

VanDeMark v. McDonald's Corporation

153 N.H. 753, 904 A.2d 627 (2006)

The plaintiff, Dana VanDeMark, appeals an order of the Superior Court (*McGuire, J.*) granting summary judgment for the defendant, McDonald's Corporation. We affirm. [...]

The following facts were found by the trial court or appear on the record. In or around December 1989, the defendant and Colley/McCoy Management Company, LLC (Colley/McCoy) entered into a series of agreements to establish a franchise for a McDonald's restaurant on Fisherville Road in Concord, including a franchise letter agreement, a license agreement, and an operator's lease. The defendant is the franchiser and owner of the building in which Colley/McCoy, as franchisee, operates the restaurant. The license agreement provided, in relevant part:

Licensee not an Agent of Licensor. Licensee shall have no authority, expressed or implied, to act as agent of Licensor, McDonald's.... Licensee is, and shall remain, an independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business....

The operator's lease also provided:

No Agency Created: Lessee shall have no authority, express or implied, to act as agent of Lessor, or any of its affiliates for any purpose. Lessee is, and shall remain, an independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business....

Colley/McCoy operates as a separate entity, independent of McDonald's Corporation. It is responsible for the cost of purchasing equipment for the restaurant, and paying for the fixtures, food products, advertising, maintenance, utilities, and insurance. It hires and trains its own employees. The license agreement provided that the defendant could hold Colley/McCoy in "Material Breach" and terminate the agreement if Colley/McCoy failed, among other things, to "maintain and operate the Restaurant in a good, clean, wholesome manner and in compliance with the standards prescribed by the McDonald's System."

In its role as franchiser of McDonald's restaurants, the defendant published an operations and training (O&T) manual, which addressed a number of issues related to the operations of McDonald's restaurants, including safety and security procedures. However, the O & T manual provided:

McOpCo employees should consider the rules and regulations contained in this chapter as company policy.

Independent owner/operators are encouraged to adopt appropriate policies for their restaurant.

A "McOpCo" is a restaurant that is owned and operated by the defendant itself.

The defendant employed field consultants to monitor McDonald's restaurants. In early 2001, Christine Perrault assumed the role as field consultant for the Colley/McCoy restaurant. In January 2002, the defendant published a "Quality, Service, Cleanliness (QSC) Play Book" for field consultants to use in evaluating its restaurants and recommending improvements. On June 25, 2002, Perrault conducted a "restaurant systems review" of the restaurant and found deficiencies concerning shift management, food safety, and production. She requested that Colley/McCoy develop an "action plan" to rectify such deficiencies. Perrault also found several deficiencies in the restaurant's execution of the "Safety and Security" system. She did not request the development of any action plan in response to these deficiencies.

The plaintiff began working at the restaurant in the late 1990's as an overnight custodian. His shift was from midnight until 8:00 a.m. The restaurant was closed during that time and the plaintiff worked alone. On February 6, 2003, at approximately 3:00 a.m., two intruders attacked the plaintiff while he was taking a break outside of the restaurant. One of the intruders carried a baseball bat and ordered the plaintiff inside the building. Once inside, the intruders tied up the plaintiff and beat him with another pipe-like instrument. The intruders demanded that the plaintiff give them the combination to the safe. When he insisted that he did not know it, they beat him again until he lost consciousness. When the plaintiff awoke, he was face down on the restaurant floor. He remained motionless until the intruders left. At that point, he managed to untie himself and make his way to the restaurant's panic button. After pressing the button, the plaintiff lost consciousness again. He alleges that the panic button was broken and did not alert the Concord police. At approximately 4:45 a.m., an employee reporting for work found the plaintiff unconscious and dialed 911. The plaintiff was transported to Concord Hospital where he was treated for multiple injuries.

The plaintiff brought claims for negligence and vicarious liability against the defendant as a result of injuries he suffered as an employee of Colley/McCoy. The trial court granted the defendant's motion for summary judgment concerning both claims, finding that: (1) no genuine issues of material fact exist; (2) the defendant did not assume a duty to ensure that Colley/McCoy would follow its security measures designed to protect employees; and (3) the defendant did not retain sufficient control over Colley/McCoy's security policy so as to subject it to vicarious liability.

On appeal, the plaintiff argues that the trial court erred in granting summary judgment on his negligence and vicarious liability claims by: (1) ignoring evidence in the record that the defendant assumed and breached duties to provide adequate security at the restaurant; and (2) ignoring evidence in the record that Colley/McCoy was an agent of the defendant.

[Discussion on standard of review & the first (direct negligence) claim is omitted, except for the following passage:

“The trial court [...] found that Colley/McCoy, as a franchisee, was not required to implement the defendant's security recommendations. The trial court also relied upon the deposition testimony of Johnny Webb, McDonald's divisional security manager, who testified that franchisees like Colley/McCoy were not required to follow the defendant's security policies, and Christine Perrault, McDonald's field consultant for the restaurant, who testified that her role was only to *recommend* and not mandate compliance with security procedures. The trial court also considered the affidavit of John Loftus, Vice President of Colley/McCoy, who stated that Colley/McCoy, and not the defendant, was responsible for security at the restaurant.”]

Next, we review whether the trial court erred by granting summary judgment to the defendant on the plaintiff's vicarious liability claim on the basis that no agency relationship existed between the defendant and Colley/McCoy.

Whether an agency relationship has been established is a question of fact. "An agency relationship, or lack thereof, does not turn solely upon the parties' belief that they have or have not created one." Rather, the necessary factual elements to establish agency involve: (1) authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act; and (3) the understanding that the principal is to exert some control over the agent's actions.

The trial court concluded that "the record, viewed in the light most favorable to the plaintiff, does not support a finding that an agency relationship exists." The trial court relied upon the absence of evidence that the defendant retained any control over Colley/McCoy security procedures, as well as the license agreement and operator's lease which, as noted above, provided that there was no agency relationship between Colley/McCoy and the defendant.

The plaintiff argues that the presence of the relevant document provisions does "nothing to change the reality of agency." He contends that by executing the license agreement, "Colley McCoy obtained McDonald's authorization to act for McDonald's as a purveyor of the 'McDonald's System,' and Colley McCoy consented to act." He further contends that:

McDonald's has maintained a continuous prescription of what Colley McCoy shall and shall not do. McDonald's mandates compliance with the "McDonald's System." McDonald's mandates particular methods for preparing foods, as well as food preparation and service times. McDonald's mandates through the "QSC Play Book" that franchisee restaurants such as Colley McCoy implement "key success factors" in their restaurants. Moreover, McDonald's sends out field consultants such as Ms. Perrault to Colley McCoy to ensure that McDonald's specifications are met.

We have yet to address the issue of the vicarious liability of a franchiser for the security breaches of its franchisee. The trial court correctly recognized, however, that although case law in other jurisdictions is not uniform, the weight of authority construes franchiser liability narrowly, finding that absent a showing of control over security measures employed by the franchisee, the franchiser cannot be vicariously liable for the security breach. *See, e.g., Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301, 309 (1998) (en banc) (concluding that while Burger King reserved the right to enforce its standards and required that franchisees comply with the guidelines in Burger King's manual, it had not "retained control over the security of the franchise restaurant"); *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182-83 (Ind.Ct.App.1997) (concluding that although the franchiser published a security manual and engaged in efforts to "heighten awareness" and "offer suggestions" concerning security to franchisees, it was not vicariously liable for the alleged negligence of its franchisee as it did not "specifically mandate any security

measures"); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 814-15 (Iowa 1994) (concluding that even though McDonald's required its franchisees to use its business manuals and attend training programs, its authority was "no more than the authority to insure 'the uniformity and standardization of products and services offered by a [franchiser's] restaurant'" and, thus, McDonald's was not vicariously liable for the criminal assault by a third party at the franchisee restaurant).

In analyzing this issue, the trial court relied primarily upon *Wendy Hong Wu v. Dunkin' Donuts, Inc.*, 105 F.Supp.2d 83 (E.D.N.Y.2000), in which the United States District Court for the Eastern District of New York surveyed extensive state and federal case law concerning the vicarious liability of a franchiser for the security breaches of its franchisee. In *Wendy Hong Wu*, an employee of a Dunkin' Donuts' franchisee brought a vicarious liability claim against Dunkin' Donuts after she was raped and assaulted while working the night shift. The court specifically examined whether Dunkin' Donuts had control over the alleged "instrumentality" that caused the harm. The court held that since there was no evidence that Dunkin' Donuts actually mandated specific security equipment or otherwise controlled the steps taken by its franchisees in general to protect employees, it was not vicariously liable for the alleged lapse in security. The court reasoned that the franchise agreement was "primarily designed to maintain uniform appearance among its franchisees and uniform quality among their products and services to protect and enhance the value of the Dunkin' Donuts trademark. [The franchisee] remain[ed] solely responsible for hiring, firing, and training its employees and for making all day-to-day decisions necessary to run the business." In addition to finding a lack of control over security matters within the franchise agreement, the court stated that "the undisputed evidence in the record demonstrates that [Dunkin' Donuts] merely made security equipment available for purchase and suggested that alarm systems and other burglary prevention techniques were important [.]"

The plaintiff urges the court to rely instead upon *Butler v. McDonald's Corp.*, 110 F.Supp.2d 62 (D.R.I.2000), a case not addressed by the trial court. In *Butler*, the plaintiff brought suit against McDonald's for injuries he sustained when the door of a franchisee restaurant shattered on his entry. The plaintiff claimed that the injury was caused by the franchisee's negligent failure to repair the premises but sought to hold McDonald's vicariously liable pursuant to an agency relationship between McDonald's and its franchisee. McDonald's argued that there was no agency relationship based upon the plain language of the franchise license agreement, which explicitly stated that "no agency had been created," and an affidavit from a corporate officer of McDonald's, stating that it did "not own, operate, or have a right to control the franchise restaurant." The plaintiff countered that McDonald's exercised a right to control through its requirement that the franchisee conform to "the McDonald's 'comprehensive' system, the frequent and detailed inspections of the premises and its operations, the taking of profits, and the right of defendant to terminate the agreement for material breach." The United States District Court for the District of Rhode Island concluded that the plaintiff offered sufficient evidence to demonstrate McDonald's requisite right to control the franchise restaurant, and that a reasonable jury could have found the existence of an agency relationship.

We find the reasoning employed by the *Wendy Hong Wu* court, which examined facts similar to those here, more persuasive than that in *Butler*, as we believe that this issue turns narrowly upon the defendant's level of control over the alleged "instrumentality" which caused the harm. The *Butler* court, by contrast, found an agency relationship based upon indicia of general control; it did not determine whether McDonald's specifically maintained a right to control repairs to the premises.

We agree with the trial court that the evidence demonstrates that although the defendant maintained authority to insure the uniformity and standardization of products and services offered by the Colley/McCoy restaurant, such authority did not extend to the control of security operations. Thus, there was no genuine issue of material fact as to whether the defendant exercised control over the relevant security policies at the restaurant through adopting the QSC Play Book.

Because we conclude that the defendant did not retain sufficient control over Colley/McCoy's security policies so as to subject it to vicarious liability, we hold that the trial court did not err in granting the defendant's motion for summary judgment on the plaintiff's vicarious liability claim.