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Haber v. Precision Sec. Agency

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N.Y.Sup. 2009.

Slip Copy24 Misc.3d 1229(A), 2009 WL 2357734, 2009 N.Y. Slip Op. 51667(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

Jack Haber, Plaintiff,

v.

Precision Security Agency, STEREO, MICHAEL SATSKY, ANN STEPHANIE GARGIULO, DOROTHY ANN DEVOTI, LAURA JEAN STOPOLI, "JOHN DOE 1," and "JOHN DOE 2," fictitious names to describe Individuals whose identities are not known,

Defendants.

22213/2007

Supreme Court, Kings County

Decided on July 27, 2009

CITE TITLE AS: Haber v Precision Sec. Agency

ABSTRACT

Contracts

Agreement for Benefit of Third Persons

Contract for Security Services

Haber v Precision Sec. Agency, 2009 NY Slip Op 51667(U). Contracts-Agreement for Benefit of Third Persons-Contract for Security Services. (Sup Ct, Kings County, July 27, 2009, Saitta, J.)

APPEARANCES OF COUNSEL

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OPINION OF THE COURT

Wayne P. Saitta, J.

Defendants, PRECISION SECURITY AGENCY, STEREO and MICHAEL SATSKY, (hereinafter "Defendants"), move this Court for an Order pursuant to CPLR §3212 for summary judgment against the Plaintiff and granting such other and further relief as this Court deems just and proper.

Upon reading the Notice of Motion by Craig P. Mauro, Esq., Attorney for Defendants, PRECISION SECURITY AGENCY, STEREO and MICHAEL SATSKY, dated December 24th, 2008, together with the Affirmation in Support of Craig Mauro, Esq., dated December 24th, 2008, and all exhibits annexed thereto; the Affirmation in Opposition by Frank A. Andrea, Esq., Attorney for Plaintiff, JACK HABER, dated February 19th, 2009, together with the Affidavit in Opposition of Plaintiff, JACK HABER, dated February 10th, 2009, and all exhibits annexed thereto; the Reply Affirmation of Craig P. Mauro, Esq., dated May 6th, 2009, together with the Memorandum of Law in Support of Motion for Summary Judgment of Craig P. Mauro, Esq.; and after argument of counsel and due deliberation thereon, Defendants' motion for Summary Judgment is denied in part and granted in part for the reasons set forth below.

FACTS

On September 9, 2006, Plaintiff and a friend were patrons of a nightclub called Stereo, *2 located 512 West 29th Street, between 10th and 11th Avenues, in New York City (hereinafter "Stereo").

In the early morning hours of September 10th, 2006, Plaintiff and his friend left the inside of Stereo and stood out front, within a roped off area, to smoke. They were in front of the front door of the club. Also present in front of the club were a doorman and a security person.

While Plaintiff and his friend were outside, two unknown patrons exited the club and approached Plaintiff and his friend and began making confrontational statements. Plaintiff states he responded by talking in an attempt to diffuse the situation. He states the duration of time between when the unknown patrons approached Plaintiff and his friend to when the talking stopped was between 30 to 60 seconds. Thereafter the unknown patrons physically attacked Plaintiff and his friend. The physical attack lasted 30 to 40 seconds. Plaintiff states he was struck in the face likely more than five times by one assailant before the second began to hit him as well. Plaintiff tried to avoid being struck but did not fight back. The security personnel did not intervene.

Plaintiff states he asked the security person, who was a few feet away, why he didn't help Plaintiff as Plaintiff was not fighting back. Plaintiff states the security person responded "it's not my job" twice. Defendants did not provide any evidence to dispute Plaintiff's account of the incident.

ARGUMENTS

Defendants argue that there was no duty to protect Plaintiff from criminal acts of third persons as they had no notice of prior criminal activity on the premises. Defendants further argue they owed no contractual duty to Plaintiff. Finally they argue that because the attack was unexpected and unforeseeable, they could not have acted to prevent the attack.

Defendant Satsky argues that he is not an owner of Stereo, and has no security related responsibilities.

Plaintiff argues that Defendants had a duty to Plaintiff because altercations at a nightclub are foreseeable, and Precision's employees had ample opportunity to intervene in the incident. Plaintiff says that the contract between the Precision and Stereo provides for the protection of third persons legally on the property and therefore Precision is liable to third parties injured by their breach of the contract.

Plaintiff also argues there is at least a question of fact as to whether Satsky is an owner and therefore summary judgment should be denied as against him.

ANALYSIS

It is well established that a moving party for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. [Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853 \(1985\)](#); [Zuckerman v. City of New York, 49 NY2d 557, 562 \(1980\)](#).

Once there is a *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish ***3** material issues of fact which require a trial of action. [Zuckerman v. City of New York, 49 NY2d 557 \(1980\)](#); [Alvarez v. Prospect Hosp., 68 NY2d 320, \(1986\)](#). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

When considering a summary judgment motion for failure to make out a case, this Court is required to accept the Plaintiffs' evidence as true and give it the benefit of "every reasonable inference which can be reasonably drawn from that evidence." [Secof v. Greens Condominium, 158 AD2d 591](#) citing, [Goldstein v. Hauptman, 131 AD2d 724](#).

In [Scotti v. W.M. Amusements, Inc., 226 AD2d 522, 640 NYS2d 617 \(2nd Dept 1996\)](#), the Second Department cited the rule which dictates a landowner's liability for injuries caused by third parties on its property.

"As a general rule, a landowner must exercise reasonable care to protect patrons on its property which includes the "duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control, (quoting [D'Amico v Christie, 71 NY2d 76, 84-85](#)). However, the landlord or owner of a public establishment

has no duty to protect patrons against unforeseeable and unexpected assaults“ *see also*, [Riviera v 21st Century Rest., 199 AD2d 14;Lindskog v Southland Rest., 160 AD2d 842, 843\).](#)

In order to establish that Defendants had a duty to Plaintiff, it must be established that the Plaintiff was on Defendants' property or an area which they put to a special use. It is undisputed that the roped off area in question was being used in the operation of the club. It is also undisputed that the altercation took place within the roped off area and therefore, Defendants had a duty to the Plaintiff when they had the opportunity to control third persons and was reasonably aware of the need for such control.

Defendants cite [Adiutori v. Rabovsky Academy of Dance, Inc. , 149 AD2d 637,540 NYS2d 457 \(2nd Dept 1989\)](#). In *Adiutori*, the infant plaintiff sought to recover for personal injuries sustained in an assault at a dance studio. The Court found that defendant owed no duty to protect plaintiff against criminal conduct where plaintiff produced no evidence that defendant had notice of prior criminal conduct on the premises.

Whether there was a history of prior criminal activity is relevant at a dance studio, where it is not reasonably foreseeable that a child attending dance classes might be at risk of assault by a third person on the premises. However, whether there was a history of criminal activity at Defendants' establishment is not dispositive. Defendants' establishment was a nightclub that served alcoholic beverages. It is not unknown for fights to occur in nightclubs where alcohol is served. The club employed a security detail and had security positioned throughout the club. Rivera, who was head of security at Precision at the time of the incident, stated that the policy in dealing with rowdy disrespectful patrons was to ”remove any patrons of rowdiness [sic] and protect the more calmer [sic], passive customers“. The policy was to ”escort them“, presumably from the premises.

The fact that Precision had a policy to intervene with ”rowdy patrons “ provides a reasonable basis for a jury to conclude that the type of altercation in which Plaintiff was involved was foreseeable. Further, there is also a question of fact as to whether the assault in this case was *4 unforeseeable and unexpected.

Based upon the uncontroverted testimony of the Plaintiff, a jury could reasonable determine the argument was loud enough and lasted long enough to signal to security, positioned three steps away, that the argument might have escalated to something more before it did. Plaintiff testified that the time between when the two unknown patrons came out of the club and began arguing with the Plaintiff, and when they first punched Plaintiff, was 30-60 seconds. Defendants have not submitted evidence to put this fact into dispute.

Furthermore, even if security was unaware it would get physical, Plaintiff testified that the actual physical assault lasted 30-40 seconds which raises a question as to whether there was sufficient time for staff to intervene, given their proximity to the assault.

Defendants cite several cases in support of their position that they owed no duty to the Plaintiff as the assault was spontaneous and unforeseeable.

In [Scotti v. W.M. Amusements, Inc., 226 AD2d 522,640 NYS2d 617 \(2nd Dept 1996\)](#), the Second Department granted the defendant summary judgment. The plaintiff was assaulted by a group of youths at an amusement park upon exiting a roller coaster ride. There was a brief oral exchange and then an assault within seconds.

The Court found that there under the circumstances, the defendant amusement park could not reasonably have been expected to anticipate or prevent the assault where there was no reason to suspect that such incidents would occur at that location.

In [Steven v. Spec.](#), 224 AD2d 811,637 NYS2d 979 (3rd Dept 1996), the Third Department determined that a nightclub owner was not liable for injuries sustained by one of its patrons when he was hit with a bottle by a non employee, independent contractor. The assault took place when plaintiff refused to the leave the stage area after a performance and the total altercation lasted 20 to 30 seconds.

The case at bar is distinguishable from the decisions in *Scotti* and *Steven*. In both *Scotti* and *Steven*, the assaults were spontaneous, they occurred in random and unmonitored locations on the premises, and those defendants had no reasonable opportunity to intervene prevent the assault.

Here, although the argument may have started spontaneously, it continued as a verbal altercation for at least 30 seconds before it became physical. Further, unlike in the cases cited, the physical assault in this case lasted an additional 30 to 40 seconds, and the security guard was stationed in the immediate vicinity. Additionally, the statement of the Precision employee that it was not his job to intervene indicates not that he was unable to do so, but that he was unwilling to do so.

The fact that there was security personnel within feet of the altercation, that the argument lasted at least 30 seconds before the physical assault began, that Plaintiff was hit repeatedly, and that security told Plaintiff after the attack that was not his job to intervene, would allow a reasonable jury to conclude that Defendant's employees were close enough to hear and observe the altercation, and to intervene in the attack which caused Plaintiff's injuries.

Furthermore, the fact that the security personnel was present during the verbal altercation which preceded the physical attack also provides a reasonable basis to conclude the physical attack was foreseeable.

Defendant Precision denies it owed any duty to the Plaintiff. However, the contract and *5 the amendment to the contract that was annexed to Defendants' motion for summary judgment indicate that Precision was the sole provider of security services while under contract with Stereo.

Under the "Services to be Provided" heading, the contract reads services included, but were not limited to, "protecting with non-lethal, non-injurious and reasonable methods all property, employees and other persons legally on the property of the Venue..."

The "Indemnification" clause reads that Precision agrees to "defend, indemnify and save the Venue harmless (a) from and against any and all claims, actions, damages, liability and expense, including reasonable attorney's fees, in connection with loss of life, personal injury and/or damage to property arising from or out of the provision of security services under this Contract by [Precision] or its agents at the Venue, and/or (b) from any and all claims of sole, joint or contributing negligence or intentional acts or omissions of [Precision] and /or its agents at the Venue."

The contract amendment further states that should Stereo hire other security personnel for an event, Precision would not be liable.

These contract documents demonstrate that Precision intended to provide security services to protect third parties legally on the property and therefore patrons were intended beneficiaries of the contract to provide security. A non-party may sue for breach of contract if it is an intended, and not a mere incidental beneficiary, even if not mentioned as a party to the contract, if the parties' intent to benefit the third party is apparent from the face of the contract. See [LaSalle Nat. Bank v. Ernst & Young LLP](#), 285 AD2d 101,729 NYS2d 671 (1st Dept 2001). [East Coast Athletic Club, Inc. v. Chicago Title Ins. Co.](#), 39 AD3d 461,833 NYS2d 585 (2nd Dept 2007). Where performance is to be rendered directly to a third party under the terms of an agreement, the third party is deemed an intended beneficiary of the covenant and is entitled to sue for its breach. [Goodman-Marks Associates Inc. v. Westbury Post](#)

[Associates, 70 AD2d 145,420 NYS2d 26 \(2nd Dept 1979\).](#)

Lastly, Defendant Satsky asserts he is not liable because he is not an owner of Stereo. In his deposition, Satsky states that he was employed by 512 West 29th Street, LLC, doing business as "Stereo", as a promoter, and had no security related duties.

Although Plaintiff argues that Satsky was an owner of Stereo, he fails to submit any admissible evidence to that effect. Plaintiff only submitted copies of newspaper articles which refer to Satsky as an owner. The articles, however, are not admissible evidence. In the absence of any admissible evidence indicating that Satsky is an owner of the club or supervised operations, Satsky is entitled to summary judgment dismissing the complaint as against him.

WHEREFORE, Defendants' motion for summary judgment is denied except to the extent that the causes of action against Defendant Michael Satsky are dismissed. This shall constitute the decision and order of this Court.

E N T E R,

J. S. C.

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N.Y.Sup. 2009.

Haber v Precision Sec. Agency

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