

**Morillo v West 43rd St. Rest. Corp.**

2004 NY Slip Op 30392(U)

October 8, 2004

Supreme Court, New York County

Docket Number: 108631/02

Judge: Diane A. Lebedeff

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF  
*Justice*

PART 8

Jose Morillo, JR.  
  
West 43<sup>RD</sup> Street  
RESTAURANT Corp.

INDEX NO. 108631/02  
MOTION DATE 9/23/04  
MOTION SEQ. NO. 1  
MOTION CAL. NO. 2

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for SJ

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

	PAPERS NUMBERED
<del>Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...</del>	} 1-3
Answering Affidavits - Exhibits _____	
Replying Affidavits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
OCT 20 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: OCT 08 2004

*Dr*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY I.A.S. PART 8

-----X

JOSE MORILLO, JR.,

Plaintiff,

-against-

Index No. 108631/02  
Mot. Seq. No. 009

WEST 43RD STREET RESTAURANT CORP.,  
WEST 43RD RESTAURANT CORP., d/b/a  
CLUB NEW YORK, LA DINH TRAN, LA DINH  
TRAN d/b/a CLUB NEW YORK, ALPHONSE HOTEL  
CORPORATION, ALPHONSE HOTEL  
CORPORATION d/b/a CLUB NEW YORK,  
TRUONG D. TRAN d/b/a CLUB NEW YORK,  
JOHN GUNGIE RIVERA, JOHN GUNGIE RIVERA  
d/b/a PRESTIGE PRODUCTIONS, JOHN GUNGIE  
RIVERA d/b/a PRESTIGE ENTERTAINMENT,  
JOHN GUNGIE RIVERA d/b/a CLUB NEW YORK,  
PRESTIGE PRODUCTIONS, INC., and PRESTIGE  
ENTERTAINMENT, INC., d/b/a CLUB NEW YORK,  
76 CORP., MICHAEL BERGOS d/b/a 76 CORP., and  
MICHAEL BERGOS d/b/a CLUB NEW YORK, SC  
SECURITY, INC.,

Defendants.

-----X

**DIANE A. LEBEDEFF, J.:**

Defendant Alphonse Hotel Corporation (“Alphonse”), an out-of-possession landlord, moves for summary judgment and for an extension of the statutory time for bringing the motion.

The note of issue was filed on January 9, 2004. Defendant explains that it did not move within 120 days thereafter because, until a mediation conference held on May 12,

2004, it believed plaintiff intended to voluntarily discontinue the action as to it. Almost four months later, plaintiff brought on the instant motion by order to show cause dated September 7, 2004. Defendant urges the court has discretion to hear meritorious but belated summary judgment motions. However, absent a showing of “good cause” for the second four-month delay in bringing this motion, the court has no discretion to hear this eleventh-hour motion for summary judgment, even though plaintiff does not press an objection on the grounds of untimeliness (*see Brill v. City of New York*, 2 N.Y.3d 648 [2004], statutory violation cannot be excused absent showing by movant of “good cause” for delay). The issues raised in the motion will have to be determined by a “motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial” (*id.*).

Notwithstanding this disposition, the court notes that some of the cases cited by plaintiff address structural defects existing in property at the time it is rented to a tenant with the expectation that large numbers of people will be invited onto the property (*see Campbell v. Elsie S. Holding Co., Inc.*, 251 N.Y. 446 [1939], owner not liable to lessee’s invitee who was killed in fall from defective elevator in warehouse). Such cases have no relevance in this case, which involves a criminal attack by a third party upon a patron of a hip hop club located in space leased in the building owned by defendant Alphonse.

The applicable principle, also referred to by plaintiff, is that landowners have a common-law duty to take minimal precautions to protect tenants and members of the public from the foreseeable criminal acts of third parties (*see Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519-520 [1980]). A landowner has a duty “to keep its premises free

of known dangerous conditions, which may include intoxicated guests,” and to control the conduct of third persons on the premises when the landowner has “the opportunity to control such persons and [is] reasonably aware of the need for such control” (*D’Amico v. Christie*, 71 N.Y.2d 76, 85 [1987]).

However, an out-of-possession landowner will not be held liable for injuries that occur on the premises due to the criminal acts of third parties, unless it has retained control over the premises or is contractually obligated to provide security (*see DeJesus v. New York City Health & Hospitals Corp.*, 309 A.D.2d 729 [2d Dept. 2003]; *compare Cavanaugh v. Knights of Columbus Council 4360*, 142 A.D.2d 202 [3d Dept. 1988], *app. denied* 74 N.Y.2d 604 [1989], lessor of party hall not liable to person injured in fight at premises; *Smith v. 2J Management Co., Inc.*, 211 A.D.2d 418 [1st Dept. 1995], owner not liable for assault by subtenant’s employees upon patrons at its bar, with *Jarvis v. Nation of Islam*, 251 A.D.2d 116 [1st Dept. 1998], *app. dismissed* 92 N.Y.2d 946 [1999], denying owner’s motion to dismiss because “record is insufficient to determine who assaulted plaintiffs, and, if the assault was committed only by members of [owner’s] lessee’s congregation, whether [owner] had notice of prior occurrences creating a duty to take precautions against such an occurrence”; *Jenkins v. Ehmer*, 272 A.D.2d 976 [4th Dept. 2000], individual owner, who was frequently present at motel where attack occurred, failed to sustain burden of showing that he lacked notice of the allegedly dangerous condition of the premises or did not retain control over the premises).

In this case, plaintiff asserts that Alphonse’s principal lived at the premises and had notice of prior occurrences, while Alphonse shows its tenant was responsible for security in

the club. The questions of whether Alphonse had notice of a dangerous condition, as well as the ability or opportunity to control the conduct of club patrons or to prevent dangerous conditions at the club, may fairly be considered unresolved by the record.

Accordingly, the motion for summary judgment is denied.

This decision constitutes the order of the court.

Dated: October 8, 2004



\_\_\_\_\_  
J.S.C.

**FILED**  
**OCT 20 2004**  
COUNTY CLERK'S OFFICE