Bilias v Gaslight, Inc.
2011 NY Slip Op 32700(U)
September 30, 2011
Supreme Court, New York County
Docket Number: 115369/06
Judge: Paul Wooten
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SCANNED ON 10/18/2011

[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JAMES BILIAS,

Plaintiff,

Index No. 115369/06
Seq.: 005

- against -

GASLIGHT, INC. and ALEX SANCHEZ,
Defendants.

In the following papers defendant Gaslight moves, pursuant to CPLR 3212, for an order dismissing the plaintiffs' complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

Before the Court is a motion by defendant Gaslight, Inc. ("Gaslight"), pursuant to CPLR 3212, to dismiss the complaint in this negligence action.

BACKGROUND

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff, James Bilias, commenced this action seeking to recover damages for personal injuries he allegedly sustained on December 18, 2005, at approximately 3:00 a.m., when he was assaulted by defendant Alex Sanchez ("Mr. Sanchez") outside of Gaslight, a bar located at 400 West 14th Street, New York, New York. Plaintiff essentially claims that he was a patron at the Gaslight on the night of the alleged incident; that he was escorted out of the bar by Mr. Sanchez after getting into an altercation with another patron of the bar; and that Mr. Sanchez followed him outside the bar and physically assaulted him, causing serious injury.

Plaintiff alleges a cause of action sounding in negligence (1) against Gaslight under theories of respondeat superior, negligent hiring, and negligent ownership and operation of the bar, and (2) against Mr. Sanchez based on the physical assault. Specifically, the complaint alleges that Mr. Sanchez provided security services for Gaslight on the night of the alleged incident, and that he was acting in the course of his employment with Gaslight, and in

furtherance of Gaslight's business, when he physically assaulted plaintiff. The Bill of Particulars contains similar allegations, and further states that plaintiff suffered multiple fractures of the left ankle.

Gaslight answered, generally denying the allegations in the complaint, asserting numerous defenses, and alleging cross claims against Mr. Sanchez for contribution or indemnification. Mr. Sanchez failed to appear. Gaslight now seeks summary judgment dismissing the complaint. Note of Issue was filed on February 3, 2010.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65

NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

As stated, plaintiff alleges in the complaint a cause of action for negligence. Negligence is the breach of a duty resulting in injury (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). Generally, a landowner must act in a reasonable manner to prevent harm to those on its property (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). Furthermore, the owner has a duty to control the conduct of third persons on its premises when the opportunity to control exists and the owner is reasonably aware of the need for such control (*see D'Amico v Christie*, 71 NY2d 76, 85 [1987]).

In seeking summary judgment on negligence, Gaslight argues that it had no duty to protect plaintiff since the alleged assault occurred outside of Gaslight's premises. Gaslight also contends that it cannot be held vicariously liable for the alleged assault upon plaintiff by Mr. Sanchez since said assault reportedly followed a personal exchange between the two men. Gaslight further argues that the negligent hiring claim is unsubstantiated.

Normally, an employer may be rendered vicariously liable under the doctrine of respondeat superior for a tort committed by an employee while acting in the course of the performance of duties for the employer (*see Riviello v Waldron, supra*). In order for liability to attach, the tortious act must have been performed within the general scope of the employment or in furtherance of the interests of the employer (*see Adams v New York City Tr. Auth.*, 211 AD2d 285, 294 [1st Dept 1995]). Moreover, the employer is not excused merely because the employee, acting in furtherance of the employer's interests, exhibits human failings and performs negligently or otherwise than in an authorized manner (*see Riviello v Waldron, supra*). Instead, the test is whether the act was done while the employee was doing the employer's work, no matter how irregularly or without regard for instructions (*id.*). As such, liability may attach not only for acts undertaken at the explicit direction of the employer, but also for acts

which fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act (*id.* at 302-303).

Furthermore, the determination of whether a particular act was within the scope of employment is so heavily dependent upon factual considerations, the question is ordinarily one for the jury (*id.* at 303). The factors to consider include the connection between the time, place, and occasion of the act; the history of the relationship between the employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated (*id.*).

A claim for negligent hiring and retention requires a showing that the employer knew or should have known of the employee's propensity for the conduct which caused the alleged injury (*see Gomez v City of New York*, 304 AD2d 374 [1st Dept 2001]). To support its summary judgment position, Gaslight offers, *inter alia*, transcripts from the examinations before trial ("EBTs") of plaintiff, Gaslight owner Peter Collins ("Mr. Collins"), plaintiff's friend Dominique Diaz ("Ms. Diaz"), and Gaslight floor manager Raymond Singleton ("Mr. Singleton"). Plaintiff notes that the transcripts from Mr. Collins, Ms. Diaz, and Mr. Singleton submitted by Gaslight are unsigned and, as such, should be rejected. However, plaintiff's objection to the Court considering the unsigned transcripts is unavailing since documents attached to the reply papers on this motion demonstrate that the original transcripts were promptly forwarded to the deponents for execution (*see Mazzarelli v Plus Realty*, 54 AD3d 1008 [2d Dept 2008]).

At an EBT held on January 24, 2008, plaintiff testified that on the night of the alleged assault, he went to Gaslight with two friends, Ms. Diaz and Shirley Rodriguez ("Ms. Rodriguez") (Bilias EBT, Not of Mot, Exh D, p. 18). He also testified that he was forcefully escorted out of the bar by Mr. Sanchez after getting into an altercation with another patron at the bar (*id.* at 34-36). He further stated that the other patron pushed him, and Mr. Sanchez cursed him, as he was being escorted from the premises (*id.* at 39-41). In addition, he stated that Mr. Sanchez

grabbed him, putting him in a headlock, and continued to curse him before pushing him out of the bar toward the street (*id.* at 42). He stated that he was not injured when Mr. Sanchez pushed him toward the street (*id.* at 45).

However, plaintiff also testified that he and Mr. Sanchez continued to exchange words as he was walking across the street (*id.*). He further stated that Mr. Sanchez followed him across the street, and struck him on the left side of his head, causing him to fall to the ground and sustain injuries (*id.* at 46-47). He also stated that while he was still on the ground, Mr. Sanchez repeatedly stomped on his left leg before walking back to the bar (*id.* at 49). Plaintiff stated that he then went home, but left for the hospital a short while later (*id.* at 51). He also stated that he contacted the police and reported the incident during his three-day hospital stay (*id.* at 53).

Mr. Collins testified at an EBT held on March 13, 2008. He stated that he was the closing manager on the night of the alleged incident (Collins EBT, Not of Mot, Exh E, p. 13). He also testified that Gaslight did not employ security personnel at the lounge prior to or on December 18, 2005 (*id.* at 15, 16). He stated that generally, the floor manager would check the identifications of persons entering the bar (*id.* at 17), and that the floor manager would ask another manager or a friend to check identifications if the floor manager had to step away (*id.* at 19).

Mr. Collins also testified that Mr. Singleton was the floor manager on the night of the alleged incident (*id.* at 41). He further testified that Mr. Singleton asked him to help escort plaintiff from the bar because plaintiff was noticeably drunk and disturbing other patrons (*id.* at 41-43). Mr. Collins stated that he observed plaintiff yelling to a group of people and pushing another patron (*id.* at 44). He also stated that he and Mr. Singleton approached plaintiff and told him that he had to leave the bar (*id.* at 43-44). He further stated that he and Mr. Singleton escorted plaintiff out of the bar (*id.* at 46). He testified that he and Mr. Singleton walked with plaintiff to the bar entrance, but that neither he nor Mr. Singleton physically removed plaintiff

from the bar (*id.* at 48). He also testified that although plaintiff walked out of the bar on his own, he was yelling and appeared to be intoxicated (*id.* at 49). He further testified that plaintiff continued yelling as he crossed the street, began yelling at random people across the street, and then got into a physical altercation with them (*id.* at 50). He stated that the people with whom plaintiff was arguing outside the bar could have been in the bar earlier, but were not the same people he had been disturbing prior to being escorted out (*id.* at 55). He also stated that Mr. Sanchez was not one of the people involved in the altercation with plaintiff (*id.*).

Ms. Diaz testified at an EBT held on July 29, 2008. She stated that she, plaintiff and Ms. Rodriguez had been at the bar for approximately 45 minutes to one hour when Ms. Rodriguez and a female patron started arguing over a seat (Diaz EBT, Not of Mot, Exh G, p. 24). She also stated that plaintiff came over and asked the woman's boyfriend to calm his girlfriend down (*id.*). She further testified that the boyfriend swung at plaintiff; that plaintiff responded by shoving him; and that bouncers intervened, pulling the men apart and escorting them out of the bar (*id.*). She also testified that she and Ms. Rodriguez retrieved their coats from the coat check and followed plaintiff out of the bar (*id.*). She further stated that she saw the woman and her boyfriend on the sidewalk when she exited the bar (*id.* at 31).

Ms. Diaz also testified that as she, plaintiff, and Ms. Rodriguez were walking across the street, one of the bouncers made a comment which upset plaintiff (*id.* at 31). She stated that plaintiff and the bouncer exchanged words and two other bouncers joined in (*id.* at 34). She also stated that the three bouncers ran across the street toward them; that she and Ms. Rodriguez stood between plaintiff and the bouncers; that the bouncers began swinging around them trying to get at plaintiff; and that one of the bouncers stepped around them, knocked plaintiff onto the ground, and stomped on plaintiff's leg (*id.* at 36-37). She further stated that although there were cops in the vicinity, none responded to the scene of the alleged incident (*id.* at 37).

Ms. Diaz also testified that she ran down the block to plaintiff's apartment, woke up her boyfriend who had been staying there, and accompanied her boyfriend back to the scene of the alleged incident to help plaintiff get home (*id.* at 39-40). She further stated that her boyfriend and Ms. Rodriguez then went to the hospital with plaintiff (*id.* at 40).

Mr. Singleton testified at an EBT held on June 23, 2008. He, too, noted that Gaslight did not have any security in December 2005 (Singleton EBT, Not of Mot, Exh H, p. 11). He also stated that he was the floor manager at the bar on the night of the alleged incident, and that the floor manager was responsible for security at the bar (*id.* at 11-15). He further testified that he was stationed at the entrance on the night of the alleged incident (*id.* at 23). He acknowledged that he could have asked the bar staff or a friend to cover the entrance if he had to leave, but noted that he usually doesn't ask his friends to check identifications of patrons (*id.* at 23-24). He also acknowledged that Mr. Sanchez was a friend, but could not remember if he asked Mr. Sanchez to cover the entrance for him on the night of the alleged incident (*id.* at 26, 30).

Mr. Singleton recalled witnessing an altercation among several patrons, including plaintiff, and asking Mr. Collins for assistance in escorting all persons involved out of the bar (*id.* at 37-38). He stated that he did not recall where Mr. Sanchez was during the altercation, and noted that Mr. Sanchez did not assist him in escorting plaintiff out of the bar (*id.* at 41, 45). He also stated that plaintiff did not resist being escorted from the bar (*id.* at 50). He stated that he did not leave the bar after escorting plaintiff out, and that he last saw plaintiff in the street arguing with the some of the same people he had been arguing with inside (*id.* at 50-52). He also stated that he did not know if Mr. Sanchez was among the persons arguing with plaintiff outside the bar (*id.* at 55).

CONCLUSION

On review of the submissions, the Court concludes that the request for summary judgment should be denied. Gaslight simply does not meet its burden of submitting competent

evidentiary proof to establish the absence of any triable issues of fact as to its negligence. (See *Winegrad*, supra)

At the very least, the conflicting EBT testimonies point out the factual dispute as to whether Mr. Sanchez was present at Gaslight, providing security as a floor manager at the time of the alleged incident and, if so, whether the alleged incident was within the scope of his duties (*see Babikian v Nikki Midtown, LLC.*, 60 AD3d 470, 471 [1st Dept 2009]). Furthermore, the submissions do not amply demonstrate that the site of the alleged assault was so far removed from Gaslight's premises as to be beyond the area that it might have expected its security to control (*id.*). Instead, the submissions raise triable issues as to whether the alleged assault was a continuation of an incident which began inside the bar and spilled onto the street, and whether it was part of the floor manager's ongoing efforts to keep plaintiff out of the bar, in furtherance of Gaslight's interests. Moreover, a triable issue of fact exists as to whether Gaslight was negligent in retaining security personnel for the bar, and in consenting to the practice of permitting friends to cover for said personnel.

Accordingly, it is

ORDERED that the motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: 9-30-11

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ▲ **REFERENCE**

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

PRESENT: HON. PAUL WOOTEN
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BACKGROUND

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Plaintiff alleges a cause of action sounding in negligence (1) against Gaslight under theories of respondeat superior, negligent hiring, and negligent ownership and operation of the bar, and (2) against Mr. Sanchez based on the physical assault. Specifically, the complaint alleges that Mr. Sanchez provided security services for Gaslight on the night of the alleged incident, and that he was acting in the course of his employment with Gaslight, and in

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DISCUSSION

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In seeking summary judgment on negligence, Gaslight argues that it had no duty to protect plaintiff since the alleged assault occurred outside of Gaslight's premises. Gaslight also contends that it cannot be held vicariously liable for the alleged assault upon plaintiff by Mr. Sanchez since said assault reportedly followed a personal exchange between the two men. Gaslight further argues that the negligent hiring claim is unsubstantiated.

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CONCLUSION

On review of the submissions, the Court concludes that the request for summary judgment should be denied. Gaslight simply does not meet its burden of submitting competent

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Accordingly, it is

ORDERED that the motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: 9-30-11

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK