

**Rivera v 2297 Enter. Corp.**

2012 NY Slip Op 33320(U)

January 5, 2012

Supreme Court, Bronx County

Docket Number: 306808/2010

Judge: Lucindo Suarez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

[\* 1]

JAN 09 2012

## PART 19

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

|                     |                          |
|---------------------|--------------------------|
| Case Disposed       | <input type="checkbox"/> |
| Settle Order        | <input type="checkbox"/> |
| Schedule Appearance | <input type="checkbox"/> |

-----X  
RIVERA, BRIANIndex N<sup>o</sup>. 306808/2010

- against -

Hon. LUCINDO SUAREZ,

Justice.

2297 ENTERPRISE CORP.  
-----X

and a third-party action.

The following papers numbered 1 to 7 read on this motion, DISMISSAL.Noticed on November 9, 2011 and duly submitted as No. 47 on the Motion Calendar of December 21, 2011

|  | PAPERS NUMBERED |  |
|--|-----------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1, 2, 3, 4, 5   |  |
| Answering Affidavit and Exhibits   | 6, 7            |  |
| Replying Affidavit and Exhibits  |                 |  |
| _____ Affidavits and Exhibits  |                 |  |
| Pleadings - Exhibit  |                 |  |
| Stipulation(s) - Referee's Report - Minutes                              |                 |  |
| Filed Papers   |                 |  |
| Memoranda of Law   |                 |  |

Upon the foregoing papers, the application of third-party defendants for dismissal of the third-party complaint is granted in part, in accordance with the annexed decision and order.

Dated: 01/05/2012
  
Hon. \_\_\_\_\_
LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

-----X  
BRIAN RIVERA,

Plaintiff,

- against -

2297 ENTERPRISE CORP. d/b/a SOFA LOUNGE,

Defendant.

-----X

2297 ENTERPRISE, INC. d/b/a SOFA LOUNGE,

Third-Party Plaintiff,

- against -

JONATHAN VIERA and SAMUEL PEREZ.

Third-Party Defendants.

-----X

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated October 11, 2011 of third-party defendants and the affirmation, affidavits (2) and exhibits submitted in support thereof; the affirmation in opposition dated December 20, 2011 of third-party plaintiff and the exhibits submitted therewith; and due deliberation; the court finds:

Plaintiff alleges that two patrons assaulted him in defendant's night club. Defendant impleaded the third-party defendants on the ground that they committed the assault. Third-party defendants now move pursuant to CPLR 3211(a)(7) to dismiss the third-party claim for common-law indemnification on the ground that the third-party complaint fails to state a cause of action because there is no "contract or status," *Miele v. City of New York*, 270 A.D. 122, 123, 58 N.Y.S.2d 407, 408 (1st Dep't 1945), to support the claim. The third-party defendants submit affidavits averring that

DECISION AND ORDER

Index No. 306808/2010

Third-Party Index No.  
84024/2011

they do not have contractual relationships with defendant. Third-party plaintiff argues that the duty underlying the claim for common-law indemnification may be implied by principles of fairness and equity, and that dismissing the claim would be premature in any event without any discovery as to the possible relationship between the parties.

“A CPLR 3211 dismissal ‘may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.’” *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 571, 841 N.E.2d 742, 745, 807 N.Y.S.2d 583, 586 (2005) (citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate.” *Guggenheimer*, 43 N.Y.2d at 275, 372 N.E.2d at 20-21, 401 N.Y.S.2d at 185. The affidavits submitted in support of a motion to dismiss must conclusively establish the lack of a claim or cause of action. *See Godfrey v. Spano*, 13 N.Y.3d 358, 920 N.E.2d 328, 892 N.Y.S.2d 272 (2009). The motion may be granted if the complaint’s essential facts have “been negated beyond substantial question . . . so that it might be ruled that the pleader does not have the causes of action.” *See Guggenheimer*, 43 N.Y.2d at 275, 372 N.E.2d at 21, 401 N.Y.S.2d at 186.

The third-party complaint plainly states cognizable causes of action; the third-party defendants’ affidavits must therefore conclusively establish the lack of a claim for common-law indemnification. The affidavits negate any claim that defendant’s liability would be solely vicarious and thus subject to common-law indemnification.

Defendant has an independent “duty to maintain the premises in a reasonably safe condition under all the circumstances including, taking into consideration the nature of the particular

premises, the likelihood of injury to those on the premises, and how burdensome it would be to prevent the risk of injury." *Fleyhan v. RM Holdings Company, Inc.*, 2009 N.Y. Misc. LEXIS 5695, at \*\*14-\*\*15 (Sup. Ct. N.Y. County May 9, 2009). Defendant, however, would have no duty to protect against unexpected and unforeseeable incidents. *See Kiely v. Benini*, 89 A.D.3d 807, 932 N.Y.S.2d 181 (2d Dep't 2011). In either event, defendant's liability would be predicated upon its own negligence; as plaintiff's complaint asserts no theory other than defendant's own negligence, defendant therefore cannot assert a claim for common-law indemnification against third-party defendants. *See Chunn v. New York City Hous. Auth.*, 83 A.D.3d 416, 922 N.Y.S.2d 3 (1st Dep't 2011); *Esteve v. Nash*, 55 A.D.3d 474, 474, 866 N.Y.S.2d 186 (1st Dep't 2008); *Mathis v Central Park Conservancy*, 251 A.D.2d 171, 674 N.Y.S.2d 336 (1st Dep't 1998).

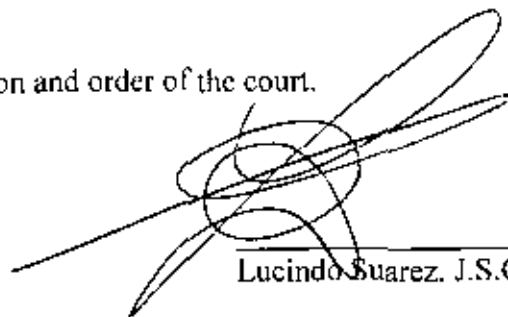
Accordingly, it is

ORDERED, that the motion of third-party defendants for dismissal of the third-party complaint is granted solely to the extent of dismissing the third-party claim for common-law indemnification; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of third-party defendants and against third-party plaintiff solely to the extent of dismissing the third-party claim for common-law indemnification.

This constitutes the decision and order of the court.

Dated: January 5, 2012



Lucindo Suarez, J.S.C.