Coon v Hotel Gansevoort Group, LLC
2015 NY Slip Op 32224(U)
November 20, 2015
Supreme Court, New York County
Docket Number: 151674/2012
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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RICHARD COON,

Plaintiff,

—against—

HOTEL GANSEVOORT GROUP, LLC, SECURITY SERVICES, INC., and JASON McADOO,

Defendants.

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Index No.:151674/2012
Subm. Date: June 10, 2015
Motion Seq. No.: 001

DECISION AND ORDER

Appearances:

For Plaintiff:
Sanocki Newman & Turret, LLP
by Joshua Fogel, Esq.
225 Broadway
New York, New York 10007
212-962-1190

For Defendants Security and McAdoo:
Lewis Johs Avallone Aviles, LLP
By Dylan Braverman, Esq.
One CA Plaza, Suite 225
Islandia, New York 11749
631-755-0101

Papers submitted on this Motion for Summary Judgment:

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ELLEN M COIN, A.J.S.C

Defendants Security Services, Inc. ("Security Services") and Jason McAdoo move to dismiss the complaint as against them pursuant to CPLR 3211 and 3212. This action arises from an alleged physical attack on plaintiff when he visited a hotel owned by defendant Hotel Gansevoort Group, LLC ("the Hotel") on January 1, 2012. Plaintiff asserts claims in negligence collectively against all defendants for negligent operation of a hotel establishment; insufficient/ inadequate security; negligent supervision of staff; negligent screening and oversight of patrons and alcohol consumption at the premises; failure to properly restrain and remove individuals

posing a threat to hotel patrons; failure to warn of known dangers; failure to provide for safe passage; failure to come to the aid of plaintiff; and failure to apprehend the assailant, establish his identity and timely summon the police.

Background and Evidentiary Record

Plaintiff, a resident of Louisiana, arrived at the Hotel on December 31, 2011 at about 10:45 p.m. to attend a New Year's Eve party in the penthouse lounge, called Plunge. Leaving the party two hours later, at about 1 a.m. on January 1, 2012, plaintiff took the elevator to go to the lobby. As plaintiff entered the elevator at the penthouse level together with an unrelated couple, six people were already in the elevator, including a security guard (Affirmation of Dylan Braverman, dated December 16, 2014, Ex. D [plaintiff's deposition], 44-46, 49, 52, 57). Two males already present in the elevator looked as if they had previously been in a fight: one of them stood almost bare-chested, wearing only a tank top, with shirt in hand, and both had cuts to their heads and blood splattered over their clothes (*id.*, 58:18-25; 59:2-3; 60:14-15). After the elevator doors closed, "the security guard said he wasn't going to—[they] couldn't move until the guys put the their shirts on" (*id.*, 61: 4-7). After they put their shirts back on, the security guard said, "All right. Let's go on and have a nice, peaceful New Year's Eve," at which point one of the two ruffians said, referring to the eventual assailant, "That's my buddy[,] I just want to get him home and get out of here. I love him so much" (*id.*, 64-10-17). During the ride down, plaintiff did not have any verbal exchanges or physical contact with either of the two ruffians and did not feel threatened by them, although they appeared to be "high" and "antsy" (*id.*, 62: 9-18, 66:12-19). As the elevator opened into the lobby and plaintiff took three steps out, he was struck without warning by a punch from behind and fell to the ground (*id.*, 64:25; 65:2-25). As plaintiff stood

up in shock a minute later, his jaw broken, he saw that the police, already present in the lobby, were holding back the assailant (*id.*, 67:10-25; 68:2-11). As a result of the attack, plaintiff had a broken jaw and underwent surgical treatment (*id.*, 83:3-11).

The principal of Security Services, Salvatore Sulla, testified at deposition that he provided security to the Hotel since 2006, initially through an entity called Secure Pro LLC and later via defendant Security Services (Braverman Affirm., Ex. F, 16: 5-13). There was never a written agreement between the Hotel and Security Services delineating the scope of the latter's services, duties and obligations (*id.*, 16:22-25, 1:2-6). As Sulla phrased it, "[b]asically what [Security Services] would do is protect the property of the hotel[;] [t]here was nothing written in stone so to speak, but that's basically it[;] [w]e were there for the hotel" (*id.*, 17:17-22). Security Services also provided security for "Plunge," operated by China Grill Management, since 2009 pursuant to a written contract (*id.*, 18:2-4, 12-15, 17-19). In case of a physical altercation, Security Services' policy and that of the Hotel was that "by no means [would security personnel] get involved in any physical altercation [sic] they would be directed to call 9-1-1 or have the police come. That's basically their protocol. . . .There is for liability purposes [sic] they have no obligation to put their hands on anybody" (*id.*, 50: 10-20). Based on Sulla's recollections and invoices Security Services submitted to the Hotel, about five security guards were present at the Hotel from 7 p.m. on December 31, 2011 until 4:30 a.m. on January 1, 2012 (*id.*, 33:16-18; 34:3).

One of the security guards present at the time of the subject incident was Julio Cuatra,[1] who was stationed at the southwest lobby door outside the front of the hotel (Braverman

[1] While the motion papers spell Mr. Cuatra's last name as "Cuadra," the Court follows the spelling contained in the deposition transcript.

Affirm., Ex. H, 13: 22-23). According to Cuatra, there were roughly about 20 security personnel working that evening, two of whom were posted by the elevators, and none working inside the elevators (*id.*, 13:7-8; 16:8-15). There was no elevator dedicated for the Plunge party (*id.*, 18:11-14). Cuatra's recollection of the day-to-day security practice at the Hotel was that if management or Sulla requested someone to leave the Hotel, the security personnel would escort them out (*id.*, 22:6-7). As a result of the altercation on the seventh floor, all 20 to 25 people involved were escorted out of the Hotel by Security Services and the Hotel's management, including the bloodied couple, one of whom later assaulted plaintiff (*id.*, 34:6-20). Cuatra heard of the altercation in the elevator on the radio earpiece that all security personnel in the Hotel wear (*id.*, 22:12-15). He was directed by his co-workers Olubaumi (Leslie) Ozekhomes and Mert Akbulut, stationed in the lobby outside the elevators (*id.*, 16:10-25), not to let plaintiff's assailant out, so he held the door preventing his escape (*id.*, 22:18-22). According to Cuatra:

> There was somebody who was punched in the elevator. Once the elevator came to the lobby there were two police officers in the lobby. A gentleman stepped out claiming to have gotten punched in the jaw. The gentleman who hit the gentleman that was holding his face was coming toward the lobby door to exit. I was told to hold the door shut, which I did. He then tried to exit by the revolving doors which were turned off. I had Jim, the bellman of the hotel, assist me. While he held the door I pushed the revolving door the opposite way so the revolving door would not move and the gentleman [the assailant] would not leave the lobby.

(*id.*, 23:1-12). Later, Leslie and Mert related to Cuatra that "as the elevator doors were opening in the lobby, a gentleman turned and struck another gentleman in the elevator and the gentleman that did the assaulting then proceeded to run out of the elevator" (*id.*, 25:20-24). Video footage of the incident appears to not have been preserved (*id.*, 35:16-19). Cuatra informed Sulla of the incident the same day:

> I told Mr. Zulla [sic] that there was a gentleman who got hit in the lobby who was a nonguest [sic]. He got assaulted by another nonguest [sic] The police were involved. The gentleman who got hit for whatever reason decided not to press charges. The police then tried to encourage the gentleman to press charges. He refused to press charges. The gentleman that did the assaulting then was asked to leave the hotel, which he did. About a half hour later the gentleman [assailant] returned trying to look for his wallet. We denied him entry and told him he would have to call tomorrow to see if any wallet was found.

(*id.*, 28: 20-25; 29:1-9; 30:8-13).

Defendant Jason McAdoo, a security guard who wrote the incident report regarding the altercation on the seventh floor, was also deposed. McAdoo did not have first-hand knowledge of the incident in the lobby. However, he responded to the disturbance in Rooms 711 and 712, from which the eventual assailant was escorted. McAdoo had no recollection of either the bloodied assailant or of who escorted him via the elevator, or if anyone was escorted out of the Hotel (Braverman Affirm., Ex. G, 29: 12-13; 45:2-7). Together with the Hotel's manager, McAdoo observed the damage done to the rooms and took photos (*id.*, 28:3-8). Two incident reports were presented to McAdoo at the deposition (Affirmation of Joshua M. Fogel, dated March 9, 2015, Ex. G). McAdoo completed only the shorter of the two reports (Braverman Affirm., Ex. G, 32:8-10).

Director of Finance for the Hotel, Yi Shang, was also deposed, but her knowledge was limited to recovery of compensation for property damage from the guest registered to Rooms 711 and 712.

No witness from Security Services could identify the security guard escorting the assailant. The police never identified the assailant. The motion papers indicate that Security Services employees Mert Akbulut and Leslie (Olubaumi) Ozekhomes were not deposed.

Summary Judgment Motion

Security Services and McAdoo move for summary judgment dismissing the action as against them pursuant to CPLR 3212,[2] arguing that they did not owe plaintiff a duty of care as he was a stranger to Security Services' agreement with the Hotel, was not a third-party beneficiary, and otherwise lacked privity to assert a claim against them. In opposition, plaintiff argues that this motion must be denied as untimely, having been made on December 16, 2014, more than 120 days after the filing of the note of issue on July 23, 2014. Further, plaintiff argues that there are material issues of fact warranting trial on the exceptions to the requirement of privity as identified by the Court of Appeals in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]).

Discussion

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the

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[2] While movants also set forth CPLR 3211(a)(1) as the basis of their motion, seeking dismissal of the complaint on the ground that a defense is founded upon documentary evidence, a motion under CPLR 3211 is subsumed in a summary judgment motion and is subject to the same outside deadline set in CPLR 3212 [a]. Furthermore, even if viewed separately, the motion does not lie, as movants do not identify any predicate documentary evidence.

existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Timeliness of the Summary Judgment Motion

In support of their contention that this motion is untimely, plaintiff and the Hotel rely on an affidavit of service of the note of issue and certificate of filling, evidencing that defendants were served with a copy of the note of issue via first class mail on July 23, 2014, and cite a well-established maxim that an affidavit of service constitutes prima facie evidence of proper service that cannot be rebutted merely by conclusory allegations denying receipt (*e.g.*, *Azcona v Salem*, 49 AD3d 343, 343 [1st Dept 2008]).

In seeking leave of Court to file a belated motion for summary judgment, movants argue that they did not receive a copy of the note of issue by mail. Further, they claim that they were never put on notice that this was an e-filed action and that as a result, their counsel did not enter an appearance and place his email on NYSCEF's service list.

> After issue is joined, a motion for summary judgment should, unless otherwise ordered by the IAS court, be made no later than 120 days after a note of issue is filed (CPLR 3212[a]) . . . While CPLR 3212 [a] and the applicable local rule specify the date of filing of the note of issue as the triggering date for the time within which to bring a summary judgment motion, and do not mention service of the note of issue, an opponent's failure to serve a note of issue constitutes good cause for a late summary judgment motion. A contrary rule would permit a party to unilaterally shorten an opponent's time to make a summary judgment motion

(*McFadden v 530 Fifth Ave. RPS III Assocs., LP*, 28 AD3d 202, 202-03 [1st Dept 2006][citations omitted]; *cf. Brill v City of New York*, 2 NY3d 648, 652 [2004]).

The Court finds that movants have rebutted the presumption afforded to plaintiff's affidavit of service. Movants' counsel was not aware that this was an e-filed action and was under the impression that the note of issue had not been filed by the deadline of August 31, 2014 and that discovery was continuing, as evidenced by his additional discovery demand for a HIPAA-compliance authorization for Dr. Hutchinson, dated October 3, 2014.

One of the benefits of NYSCEF is that a document filed electronically automatically generates a notice to all users registered on the case, simplifying service and avoiding the very dispute presented here. A review of the records before the Court does not indicate, nor does plaintiff allege, that "Notice of Commencement of Action Subject to Mandatory Electronic Filing," NYSCEF Form EFM-1, accompanied the amended complaint dated May 31, 2012, as required by 22 NYCRR § 202.5-bb (c)(2), (b) (3). Absent service of this form, movants were not on notice of the electronic filing of all court papers and could not be charged with legal knowledge of plaintiff's filing of the note of issue on July 23, 2014 (NYSCEF Docket No. 18), as service in electronically filed cases must be effected through electronic means (*see* 2 NYCRR § 202.5-bb [c][1]). Despite plaintiff's accurate observation that a copy of the summons annexed to the amended complaint in the motion papers bears a NYSCEF heading, there is nothing in the record to indicate whether this copy was identical in this respect to the one served on movants.

Further, review of NYSCEF's docket shows that this action does not contain any prior motion practice, which appears to account for why there was not an occasion for movants' counsel to be apprised of the e-filing status of the case earlier. Movants' resulting lateness in filing the motion was quite brief, made only 5 days after registration with NYSCEF, and did not

exceed 30 days. Accordingly, these circumstances sufficiently distinguish the belated summary judgment motion herein from that in *Azcona*, which did not concern an e-filed docket.

Existence of a Duty of Care owed by Defendant Security Services Inc to Plaintiff under the "Launching an Instrument of Harm" Espinal Exception in the Absence of Privity

In determining the viability of plaintiff's tort claim, the Court is guided by "the proposition that a duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence" (*Palka v Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 584 [1994]). A contractual obligation, standing alone, will generally not give rise to tort liability in favor of an unrelated third party (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]). The Court of Appeals, however, identified the following three exceptions that afford tort recovery in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]) and recently reaffirmed them in *Stiver*:

> '(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely'

(*Stiver*, 9 NY3d at 257[citations omitted]). Here, it is the launching of an instrument of harm that is the only viable scenario, as plaintiff did not testify that he expected protection at the Hotel or received explicit assurance from any of security guards that certain measures would be undertaken for his benefit (*see Stiver*, 9 NY3d at 257).

Nor did Security Services entirely displace the Hotel's duty to maintain the property safely. This would occur only where the defendant "entirely absorbed" the other party's duty to maintain safe conditions on the subject premises (*Espinal*, 98 NY2d at 141). Here, although the

scope of security services was never reduced to writing and Sulla viewed his obligation as being "there for the hotel," the facts demonstrate that the Hotel's management retained the ultimate discretion with respect to the upkeep, maintenance, control and oversight of the premises (*cf. Rahim v Sottile Security Co.*, 32 AD3d 77, 82 [1st Dept 2006]). The Hotel's own employees also participated in addressing the altercation on the seventh floor and in eventually recovering compensation for the damaged property. Security Services' role under these facts cannot be viewed as "comprehensive and exclusive" (*Espinal*, 98 NY2d at 141, citing *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]).

The "launching of an instrument of harm" scenario contemplates affirmative steps that either decrease safety or create or exacerbate an already existing dangerous condition (*Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 214 [1st Dept 1999]), but it does not apply where the breach of contract merely withholds a benefit, "where inaction is at most a refusal to become an instrument for good" (*see Stiver*, 9 NY3d at 257 [failure by licensed vehicle inspection station to identify breakage while performing state-mandated periodic safety and emission inspection], citing *Church v Callanan Indus., Inc.*, 99 NY2d 104, 112 [2002] [contractor failed to replace old road rail with additional length of guiderail in breach of contract], [quoting *H.R. Moch Co., Inc. v Rensselaer Water Co.*, 247 NY 160, 168 (1928) (failure to supply water to municipality resulting in insufficient water pressure to extinguish fire)]; *see also Rahim*, 32 AD3d at 81[security guard's failure to locate trespasser]).

Here, numerous issues of fact preclude summary judgment. While Security Services did not owe plaintiff a duty of care to protect him from threat of violence directed by third parties, it may be held responsible for thrusting a dangerous actor onto the unsuspecting plaintiff (*cf.*

Sapra v Ten's Cabaret, Inc., 2010 NY Slip Op 30594(U), *7 [Sup Ct, New York County 2010] [night club assumed duty of care to guest when it ejected guest's assailant, refused assailant reentry when he came back with baseball bat and, as assailant was standing on sidewalk outside club, removed guest onto same sidewalk).

The Hotel and Security Services removed all individuals from Rooms 711 and 712 and jointly escorted them out. Security Services and the Hotel employees were cognizant of the dangerous propensities of the two ruffians from a fight on the seventh floor when they placed them in a confined space of an elevator cab together with unwary guests. The security guard allegedly affirmatively exercised control over the elevator cab area by instructing the two ruffians to put their shirts on before the elevator would move. Plaintiff testified that the assailant appeared to be agitated and under the influence of narcotic substances. Although plaintiff also believed he did not give assailant any cause to direct a physical outburst at him, such is the nature of high octane mixture of alcohol, narcotics, masculine testosterone and hurt feelings that makes the trajectory of its force unpredictable. The danger to other people in the elevator cab should have been obvious to the security personnel, who owed plaintiff a duty, at the very least, to warn him to take either a different elevator or to use the stairs. If proven at trial, the security guard's actions might be deemed to have either created or exacerbated the dangerous security condition in the elevator cab area, giving rise to a tort duty of care (*cf. Flynn v Niagara University*, 198 AD2d 262, 264 [2nd Dept 1993][security guard assumed duty of care when intervening to break up a fight]).

It is also unclear from the record who, as between Security Services and the Hotel, employed the security guard in the elevator. Defendants have not identified the individual who

escorted the two ruffians from the seventh floor. Plaintiff is the sole witness to what transpired as he stepped into an elevator at Plunge, and he alleges that the individual escorting the two ruffians was a security guard. Mert Akbulut and Leslie (Olubaumi) Ozekhomes, the two security guards posted outside the elevator well, and thus best positioned to observe who was inside the elevator as the doors opened, were never deposed. Because Cuatro and McAdoo testified that both Security Services employees and the Hotel management were jointly engaged in removal of individuals from the seventh floor, identification of the escort is a factual issue that will have to await trial.

With respect to so much of the motion as seeks dismissal as against defendant James McAdoo, plaintiff has not shown any facts or proposed a legal theory by which he may be held liable.

Accordingly, it is hereby

ORDERED that so much of the motion for summary judgment pursuant to CPLR 3212 as seeks dismissal as against defendant James McAdoo is granted, and the balance of the motion is denied; and it is further

ORDERED that the Clerk of Court is directed to sever the above-captioned matter as against defendant James McAdoo, and the remainder of the action shall continue; and it is further

ORDERED that the Clerk of Court shall amend the caption accordingly.

This constitutes the Decision and Order of the Court.

Date: November 20, 2015

ENTER:

Ellen M. Coin, A.J.S.C.