

**Lorenzo v Great Performances/Artists as
Waitresses, Inc.**

2021 NY Slip Op 32674(U)

December 15, 2021

Supreme Court, New York County

Docket Number: Index No. 161170/2013

Judge: Richard G. Latin

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

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

HECTOR LORENZO,

Plaintiff,

- v -

GREAT PERFORMANCES/ARTISTS AS WAITRESSES,
INC.,DELAWARE NORTH COMPANIES, INCORPORATED,
CPS 1 REALTY LP, PLAZA ACCESSORY OWNER LP,
FHR (NYC) LLC,FAIRMONT HOTELS & RESORTS (U.S.)
INC.,FRHI HOTELS & RESORTS (U.S.) INC.,HAMPSHIRE
HOTELS MANAGEMENT, LLC,EL AD US HOLDING,
INC.,ELAD PROPERTIES, LLC,EL-AD PROPERTIES NY
LLC,SAHARA PLAZA LLC,SAHARA PLAZA II
INC.,SAHARA HAMPSHIRE HOTEL MANAGEMENT CO. II
INC.,SAHARA HAMPSHIRE HOTEL MANAGEMENT
LLC,KINGDOM HOLDING COMPANY, GREAT
EXPECTATIONS CATERING LLC,CPS 5 LLC,

Defendant.

-----X

GREAT EXPECTATIONS CATERING LLC, CPS 5 LLC

Plaintiff,

-against-

JOHN YAHARA, NICOLE YAHARA THOBANI, ALY THOBANI

Defendant.

-----X

DELAWARE NORTH COMPANIES, INCORPORATED

Plaintiff,

-against-

JOHN YAHARA, NICOLE YAHARA THOBANI, ALY THOBANI

Defendant.

-----X

INDEX NO. 161170/2013

MOTION DATE N/A, N/A, N/A,
N/A

MOTION SEQ. NO. 014 016 017
018

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595347/2014

Second Third-Party
Index No. 595339/2015

Third Third-Party
Index No. 595661/2015

FHR (NYC) LLC, FAIRMONT HOTELS & RESORTS (U.S.)
INC., FRHI HOTELS & RESORTS (U.S.) INC.

Plaintiff,

-against-

JOHN YAHARA, NICOLE YAHARA THOBANI, ALY THOBANI

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 014) 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 589, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 829, 833, 838

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 016) 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 588, 591, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 830, 834, 839

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 017) 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 592, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 831, 835, 842, 843, 844, 845, 846, 847

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 018) 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 832, 836, 840, 841

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

As a preliminary matter, plaintiff's motion is not untimely. Although the Part 46V rules require that motions for summary judgment be made within 60 days of the filing of the note of issue, absent leave of court, the preliminary conference order entered in this matter allows for

summary judgment motions to be made within 120 days of the filing of the note of issue. Here, there is no dispute that the motion was made within 120 days of the filing of the note of issue.

Upon the foregoing documents and after conference, it is ordered that defendants/third-party plaintiffs Great Expectations Catering, LLC and CPS 5, LLC's (herein collectively "CPS 5") motion, defendant/third-party plaintiffs FHR (NYC) LLC, Fairmont Hotels & Resorts (U.S.) Inc. d/b/a Fairmont Hotel Management, and FRHI Hotels & Resorts (U.S.) Inc. d/b/a Fairmont Raffles Holdings International's (herein collectively "Fairmont") motion, third-party defendants Nicole Yahara Thobani and Aly Thobani's motion, and plaintiff's motion, each for summary judgment, are determined as follows:

Plaintiff commenced the instant action to recover for injuries he allegedly sustained as a guest at third-party defendants Nicole Yahara Thobani and Aly Thobani's wedding when he was punched in the face by third-party defendant John Yahara on September 14, 2012 at the Plaza Hotel in New York. Now, with his motion, plaintiff seeks summary judgment against defendants CPS 5 and Fairmont on the grounds that defendants violated the Dram Shop Act and breached their duty to exercise reasonable care to maintain a safe premise and protect plaintiff from foreseeable injury. Defendants CPS 5 and Fairmont each respectively move for summary judgment, dismissing plaintiff's complaint and all cross claims. Lastly, third-party defendants Nicole Yahara Thobani and Aly Thobani each move for summary judgment, dismissing all indemnification and contribution claims against them.

In support of the motions, the parties submit, inter alia, photographs and video captures from the subject wedding, the deposition testimony of plaintiff Hector Lorenzo, Vincent Palumbo, resident manager at CPS 5, Emily Reifel, social events coordinators/sales manager at CPS 5, Orlando Carreras, director of security at Fairmont, Jonathan Gros, security officer, Ogie Ugbeva,

security officer, Aly Thobani, and Nicole Yahara Thobani, and a sworn statement from Chris Jones.

Plaintiff's Deposition Testimony

Plaintiff testified that on September 14, 2012 at approximately 6:30 PM he arrived at the wedding of Nicole Yahara Thobani and Aly Thobani at the Plaza Hotel Ballroom. Plaintiff had first met Nicole prior to the start of their freshmen year at Monmouth University and remained friends throughout most of his college experience. He averred that he was ultimately injured when Nicole's brother, John, clobbered him in the face just around midnight.

Plaintiff claimed that he gestured to John to take a shot of alcohol with him, as John was the last family member of the Yaharas that he did not directly celebrate with. He recalled that John then led him down a hallway, through a door, and down a stairway where he proceeded to punch him in the face. Plaintiff stated that his friend Chris Jones was there also to get shots and witnessed the whole incident. Plaintiff testified that he was turning around attempting to state that this was not the way to the bar when he was "nailed" in the face by John's fist. Plaintiff was shocked and did not know why this happened. He said he did not get into any altercation with John Yahara or his large friend and did not try to meet anyone's girlfriend. Plaintiff remembered John Yahara yelling that he thought plaintiff was being disrespectful, however, plaintiff did not think he did anything disrespectful, and that John was just intoxicated.

Plaintiff stated that he, himself, had been drinking during the cocktail reception and probably had three to four cocktails and three to four shots. Plaintiff then had champagne during the toast, less than one glass of red wine, and another four or five rum cocktails at the main reception and four or five shots before the incident took place. He said that often he would go to the bar for the shots, but that waitresses and waiters were also serving them. He further testified

that at no point did a bartender refuse him a drink or suggest that he slow down. Plaintiff admitted that before midnight he went to the bathroom and realized that he was intoxicated but not drunk. He defined intoxicated as impaired but in control and drunk as black out or out of control. It was then, as he was leaving the bathroom around midnight, that he ran into John Yahara again.

Plaintiff alleged that he first met John Yahara during the main reception where they traded introductions. He recalled that John was visibly intoxicated at that point. Plaintiff stated that he observed John Yahara drinking throughout the night. He recalled seeing John during the cocktail reception taking shots, celebrating very loudly, and ordering drinks as well. He believed John Yahara drank four or five alcoholic beverages during the cocktail reception.

He also claimed to have seen John drinking during the main reception. He testified at various times in the deposition that he saw John Yahara ordering drinks at the bar on several occasions and observed him drinking anywhere between two to three drinks or six combined shots and alcoholic drinks. He believed that Yahara drank these drinks because on at least one occasion he said he saw him pick up the glass and drink out of it. He also stated that these were the type of glasses that alcoholic drinks were served in and contained ice, which was different than the water glasses. Plaintiff alleged that he had an eye toward John Yahara's drinking because of his loud celebrations in which he was both the star and distraction of the wedding. Plaintiff stated that he saw John Yahara's loud demeanor only got more disruptive as the night went on. Additionally, during the cocktail reception, plaintiff described John's cheeks as flush, and he noticed that John Yahara took off his suit jacket and appeared sweaty and sloppy. He further stated that he did not see John drink from a bottle or flask or do drugs that night. Plaintiff recalled that his friend Chris remarked to him toward the end of the cocktail reception that "this guy looks drunk," referring to John Yahara. Plaintiff did not remember ever seeing John Yahara without a drink in his hand.

Plaintiff added that John was not the only person that night who appeared intoxicated. He stated that Nicole Yahara Thobani's youngest brother was also intoxicated and that at one point in the night he could not even stand up. He further recalled that he was intoxicated, and that Ryan was pretty intoxicated and that the whole Monmouth group was drinking, including Chris who had a lot of drinks.

Vincent Palumbo's Deposition Testimony

Vincent Palumbo testified that he is the resident manager of CPS 5, a catering operation located inside the Plaza Hotel. As resident manager he was responsible for the day-to-day activities of the business, including coordinating amongst the operations, culinary, and sales departments. At the time of the accident, Palumbo testified that at the venue there was an 18 to 20 camera system in place. When asked if any of the CPS 5 staff were required to take any type of alcohol-related training, Palumbo answered that waiters, managers, captains, and the HR directors were given TIPS training. He believed that barbacks were also required and that the TIPS training was an adequate training for employees to serve alcohol. However, he did not have any basis for this belief other than thinking that any training regarding the disbursement of liquor is good. Palumbo further averred that CPS 5 had a policy in the employee manual, wherein if a bartender or employee feels that a guest has shown signs of being intoxicated, or if they feel they have been drinking more than they should have, they refer those people to the manager.

Palumbo recalled that some of the bartenders that worked the Thobani wedding were Luigi Dobik, Andre Cepero, and Rajiv Modac. He stated that Cepero was still working for CPS 5 as a bartender and that he had discussed the incident a few days prior to his deposition. Palumbo said that Cepero's take was that the assailant was quiet, not really socializing with anyone, and just

kept to himself on the side not too far from the bar. Palumbo added Cepero did not believe that John Yahara was intoxicated at the time of the altercation.

Palumbo further explained that a CPS 5 bartender would be disciplined under the rules if they served alcohol to someone who was visibly intoxicated. He stated that bartenders employed by CPS 5 should alert their managers of a potential intoxication if they noticed that they served a lot of drinks to a specific person, if a person was slurring their speech, or based on the person's walking behavior. Additionally, he imagined they would consider whether someone's clothing was disheveled or if they were flush in the face. Waiters also have an obligation to report cases of intoxication to the managers. Palumbo did not have any discussions with Dobik about the Thobani wedding, nor did he speak with Modac. He said he only spoke with Cepero because he had the best viewpoint of the incident as his bar was the closest to the breezeway hallway near the restrooms. Palumbo also averred that none of the stairwells are exclusively controlled by CPS 5, that they are controlled by the hotel.

In further preparation of the deposition Palumbo also reached out and spoke with Celio Romero and someone named Max who were managers, walking the floor around the ballroom area on the night of the wedding. Celio Romero believed that plaintiff was talking or laughing during a speech being said and that John Yahara took offense to that. Max remembered the wedding crowd being overall well-behaved and that they were a good crowd. Palumbo stated that neither manager brought up whether there were high levels of intoxication at the wedding to him.

Palumbo stated that he did not learn about any guest appearing intoxicated at the Thobani wedding. He did not hear about anyone vomiting at the premises, but he also did not speak with any of the housemen that would clean it up. He also did not know of anyone who was cut off from the service of alcohol at the Thobani wedding. Palumbo also did not remember if he was ever made

aware of any other incident where there was an allegation of over service of alcohol concerning CPS 5 at the Plaza Hotel. He further added that no one, including the bridal party, was permitted to bring their own alcohol with them to the wedding. Palumbo added that it was not the regular practice to serve alcohol in the bridal suite, but that if it did happen via a wedding day request that there would be no record of it.

When asked about security, Palumbo stated that they generally did not hire security back in 2012 or at present. He recalled that for this wedding, however, the client requested security, so they hired a union security guard from within the hotel. Palumbo averred that it was his understanding that CPS 5 does not generally promote hiring security. The union security guard who was hired worked from 6 PM to 10 PM. Additionally, Palumbo was not sure if there was a fire guard working the Thobani wedding, who would have been an employee of the Fairmont.

Palumbo was also eventually shown an event recap report that was prepared by one of the managers, Max, either at the end of the subject evening or the next workday. The report stated that,

Night was went smooth until about 11:55 p.m. The aunt of the bride threw up in the Campbell Suite bathroom and then approximately two minutes later the brother of the bride punched a guest in the face resulting in bodily injury. Plaza security was called followed by NYPD. A gentleman suffered what appeared to be a broken nose and was taken away in an ambulance. The party and bride were unaware of any of this. The party ended 15 minutes early to keep the NYPD from entering the ballroom. NYPD will follow up if needed [sic].

Additionally, Palumbo was asked if he came to learn of any effort to delay the first responders into coming into the area where the wedding was being celebrated in order to prevent attendants of the event from learning of the incident. He responded that he did read somewhere that there was a delay because they did not want to affect the wedding.

Emily Reifel Deposition Testimony

Emily Reifel testified that she was one of the social events' coordinator/sales manager at CPS 5. Reifel remembered meeting with Aly and Nicole Thobani prior to the booking of their wedding. She averred that she gave them her usual pitch about the high-end abilities of her team. Because Aly and Nicole were living in London, Reifel knew that she would have a lot of responsibilities on the ground.

Reifel was shown the agreement that the Aly and Nicole entered into with CPS 5 and was specifically asked if she remembered discussing event security with the Thobanis. She stated that she did not remember having any communications regarding security or whether she gave them any guidance with respect to security. She did state, generally, that she would on occasion direct a security guard where to stand. For example, she would tell security at a bar mitzvah to stay in the area where the children were. She explained that she would never tell security to stand in the vicinity where alcohol was being served because alcohol would not be involved in her decision as to where a guard should stand.

Reifel was also shown pictures taken of Nicole Yahara Thobani in a hotel room prior to the wedding with a champagne glass in the room. Reifel explained that she could tell from the bed in the picture and the room service tray that this was a guest room under the control of Fairmont and not a CPS 5 room. She further stated that CPS 5 would book the guest room for the bride, but that Thobani could have booked additional nights on her own. She also said that CPS 5 could have booked extra nights for Thobani, that every negotiation with every client is different. Reifel also added that she could have ordered them the room service on her recommendation, on their request, or that they could have ordered it themselves. When asked if she would have assisted in arranging for alcohol to be provided, she answered, "if they wanted to order champagne, then they could

order champagne through room service. But we would maybe help them place the order.” Reifel also said that some brides will bring their own champagne so that it was not necessarily provided by the room service.

Reifel was then asked a slew of questions regarding when she first saw Nicole Yahara Thobani on the day of the wedding and whether they did a walk-through, which she mainly did not remember. Reifel did not remember whether any alcohol was delivered or consumed in any of the guest rooms where the wedding party was prior to the wedding. She did state, however, that it is not uncommon for the members of the bridal party to have alcohol prior to a wedding in a preparation area. She added that it would have been part of her routine to check in with the groom and groomsmen at their staging area prior to the wedding, but that she had no recollection of it or whether they had alcohol.

Reifel was asked more questions about the service of the alcohol prior to the wedding. She stated that it would be normal to pass champagne out at “invitation” before the ceremony would begin. The champagne would be passed out by CPS 5 uniformed waitstaff on trays.

Once the cocktail reception began, based on the amount of people expected at the wedding, Reifel believed there were two bars at the cocktail reception.

With regards to the main reception, besides for the open bar, there was champagne provided for the toasts and red and white wine available on all tables. The bartenders at the bar and the waitstaff providing champagne and wine were all employees of CPS 5. She reiterated that CPS 5 would not permit anyone else to serve alcohol to guests inside the ballroom.

When asked if, at any point prior to the incident, she ever became aware of a guest drinking to excess at the wedding she responded that she did not remember. However, she did recognize Nicole Yahara Thobani’s aunt as someone who had vomited in the bridal suite, but she did not

remember if she knew why she threw up. Reifel believed she was made aware of this during the event, but she could not remember. After she was asked if she knew of other people that became intoxicated at the wedding, she responded that she knew that guests were drinking but did not know who, or how many, or anyone else that was intoxicated. Reifel was also asked if she had any recollection of seeing John Yahara at the wedding ceremony, during alcohol service, at the cocktail reception, or ballroom and she answered that she did not.

Reifel then testified as to what she did when she learned about the subject incident. She stated that she remembered the police coming in and that she was trying to make sure they did not go into the main ballroom as to disrupt the wedding. She then clarified that she was not sure, that she may have kept the responding EMS workers from going into the main ballroom and not the police. She was not sure if this, in any way, delayed plaintiff's treatment as the incident did not take place in the main ballroom and she was not sure where the emergency response was coming from. Reifel had no recollection about giving the plaintiff a tissue or ice or talking to him and thought that a manager, Max, kept her from seeing the blood. Reifel also had no idea if bartenders were interviewed afterward or if surveillance footage was ever looked at.

Reifel was further asked questions about CPS 5 generally, unrelated to the subject wedding. When asked about how often guests were cut off from drinking at weddings, she said that she did not know how often people were cut off but that bartenders would sometimes make weaker drinks if they thought that somebody was drinking too much. Additionally, Reifel averred that she definitely has seen people intoxicated at CPS 5 events, but her version of excess may be different from other peoples.

Orlando Carreras

Orlando Carreras testified that he is a licensed security guard and director of security for Fairmont.

He recalled that he first started working as a security officer at the Plaza Hotel back in June of 2003, whereupon he quickly became a security supervisor. When he began working, he stated that he received a training manual, a hotel manual, guidelines, procedures, and company policies. In his second stint with the hotel, he was an assistant director of security until he became the director in early or mid-2010.

Carreras averred that, hypothetically, if a security officer was doing a floor sweep and came across a guest who was intoxicated and laying on the floor, the security officer would be required to fill out an incident report after some type of investigation. The investigation would entail, among other things, verifying the identity of the patron and determining if they are a guest or not guest of the hotel. He added that if the intoxicated person was not a guest, they would see if the person could make it home on their own in a taxicab or they would call 911 and ask for an ambulance if the person was not in condition to go home.

Carreras was asked a series of more questions about when injury reports or incident reports would be filed. Specifically, he was asked if an incident report should be drafted in the event of discovering the intoxication of someone on the property. Carreras stated that the mere fact that someone is intoxicated would not warrant an incident report on its own as people are intoxicated day and night at the Plaza Hotel from its many vendors who serve alcohol. He further clarified that just because someone is intoxicated it does not mean they were served in excess and that a report would not be needed unless the individual became belligerent or out of control or injured themselves or someone else. Further, he explained that he believed the Fairmont manual speaks to

how to identify the visual signs of intoxication. He did not remember it off the top of his head but based on his experience he said that they look for slurred speech, staggering, boisterous behavior, the smell of alcohol, observed continuous drinking, disheveled clothing, glassy eyes, and whether someone vomited. However, he did state that the food and beverage people would be best suited to know if someone was receiving continuous alcohol service. He further recalled that the incidence of alcohol related assaults occurred approximately once every two to three years.

Carreras was additionally asked if an incident report would be filled out if there was over-service of alcohol to patrons by one of the vendors. He said that type of infraction, "if anything, that would be reported to the food and beverage director and they would deal with that accordingly. That might not even get to me." However, he did state that if security discovered the over-service that he would request an incident report. Carreras added that security is sometimes called in to handle situations that fall within the jurisdiction of the food and beverage director if a customer is not paying a bill or is largely uncooperative. However, he stated that more often than not, those situations did not have any relation to the customer's intoxication.

Carreras was also asked as to which areas the security officers were expected to patrol. He explained that when the Plaza Hotel reopened that they were not responsible to patrol the space that was designated for condominiums. He elaborated that security staff was responsible for the hotel, the retail collection, and some of the common space. He said that there would be between three and five security guards working a shift, where there would likely only be three to four during the midnight shift, five during the busier times towards the end of the week, and four during all other shifts. Carreras added that whether events were going on at the hotel did not factor into that determination. However, he then explained that his work hours would be different if there were events with high profile guests like the United Nations General Assembly, the Tony Awards,

Bloomberg, Vanity fair, etc. In such circumstances, Fairmont and its security would participate in “pre-con” meetings before the events. Carreras stated that the Fairmont and its security would never be involved in any pre-event meeting for a wedding taking place at the ballroom, foyer, Centennial foyer, and Campbell Suite.

Carreras was specifically asked what the floor patrol was like by the grand ballroom. He stated that if no event was going on, he would stop inside the ballroom foyer if the doors are secure and there is no need for him to go into the ballroom. He added that if there was an event going, then the security officer would usually walk through the foyer but would still not walk into the ballroom to disturb an event. Carreras later clarified that he actually may not even require a floor patrol of that floor if an event was going on since there are very high-level events that go on at the ballroom that do not want the security officers there. He claimed that CPS 5 had asked them on numerous occasions not to patrol by the ballroom while events are going on.

Next, Carreras was asked about situations when Fairmont security was requested to work at CPS 5 events. He recalled that for the Yahara Thobani wedding that CPS 5 did request one security officer to work from 6PM to 10PM. Additional security assignments like this were handed out to officers based on seniority. Carreras explained that when an officer worked in this capacity, they would be performing different duties than those promulgated in the house manual and Fairmont corporate manual. He added that event security role mainly consists of observing the event itself and making sure that nothing is going wrong and intervene if there was. Carreras stated that the officer would answer “more to the person in charge of the event, not so much us, not so much myself and the assistant director of security.” He clarified that a person in charge of the event could be the director, the CPS 5 director of operations, or an operations manager but not a sales manager like Emily Reifel. He further clarified that it was not that the security officer would not

be following the regular manuals, policies, and procedures but that instead of doing a full floor patrol, their work would be confined to the event space. That event space would include the Centennial foyer and breezeway, which was where the subject incident transpired, and the Grand Ballroom where wedding celebration and drinking took place. Carreras explained that he could not expect the security officer to be at any given location at a particular time because they are supposed to move around within the confines of their post.

Moreover, he also said that the additional security guard would never interfere or engage with guests for the event. To that end, Carreras explained that if there was an intoxicated, belligerent guest that security would call a CPS manager to deal with “their” guest. At most, a security officer would call 911 or the police if they were requested to by a CPS manager. He further added that if CPS decided to refuse alcohol service to a specific guest that the additional security would not even be made aware of that because it is not in their purview. Carreras did clarify, however, that if the CPS manager was not able to diffuse a boisterous argument that looked like it may lead to physical injury that the additional security officer would radio for backup.

Jonathan Gros

Jonathan Gros testified that he was a security officer at the Fairmont. He stated that he first received his security officer license around 2002 or 2003. He worked a few different security jobs before starting with Fairmont at the Plaza Hotel on February 4, 2008.

Gros averred that in 2012 he was getting CPS event overtime events frequently since he had the 6th most seniority out of 18. He stated that CPS did not provide him with any training, direction, or written instruction for these additional assignments. Gros said that the CPS events overtime jobs would mainly consist of standing in the ballroom to observe everyone and make sure nothing was getting crazy or out-of-hand.

Additionally, he would provide a little bit of customer service since people would come to him and ask where the restroom was and stuff like that. Gros was asked what he meant by “crazy” and “out-of-hand” and explained that he would escort someone out or ask them to leave if were fighting, very intoxicated, groping, having a medical emergency, or trying to attend when they did not belong. By looking “very intoxicated” Gros explained that he meant someone who was stumbling, slurring speech, and/or smelling of alcohol. He did not have any training from Fairmont with regard to identifying individuals who had been impaired by drinking alcohol, just common sense and experience. He stated he would even ask a bride or groom to leave their own wedding if he thought their safety was in question. He explained that someone’s safety is in question when they are stumbling a lot and falling on the floor or if they were acting aggressively. He added that he would radio in for assistance if there was an intoxicated aggressive individual. Gros clarified that if someone was falling over, he would probably get permission from a CPS manager before removing one of their guests, but that he would not waste time and make the call on his own if someone was being physical with others. He stated that this, ultimately, was a judgment call for him to make.

Gros testified that Ogie Ugbeva was the security officer who was serving as additional security at the Thobani wedding, while Gros worked the Friday evening shift in either a patrol or a retail patrol assignment. Gros explained how in either capacity, during his patrol he could have walked into the foyer area, been able to observe the wedding in the ballroom, and would have checked the staircase and hallway by the Campbell suite. Nevertheless, he also explained how these roles were not stationary assignments, so that he would have continued his rounds elsewhere.

Gros was also shown the logbook from the night of the incident. It demonstrated that security was called to a wedding at the Rose Club, that police were called and dispatched, and that

EMS was called to attend to a bleeding wedding patron. On the night of the Thobani wedding, Gros remembered crossing the ballroom during his patrols into the hotel side and hearing the commotion in the stairwell, but he did not remember much else. He remembered hearing the loud shouting of a male voice, seeing five to seven males, and seeing blood on the floor and on someone, as if they had gotten assaulted. He alleged that he spoke to the men and heard something like someone punched the groom's brother or the groom's brother punched someone. Only one man in the stairwell had injuries with blood around his nose/mouth area.

Gros was asked if he made any assessment as to whether or not anybody present had been consuming alcohol. He answered that it did look like it. He said based on how loud they were, their appearance, the sweating red faces led him to believe they had probably consumed a lot of alcohol. Gros further stated that stuff like this, intoxication, and dealing with people who are intoxicated is a regular part of business at a hotel that has restaurants and bars. Likewise, he agreed that guests drinking to the point of intoxication is an occurrence that he would expect to occasionally happen at wedding events where there was an open bar. Gros estimated that of all the events he worked, CPS would ask him for help due to an out-of-control person 10% of the time, which was about 20 to 50 times. He believed that he was called over 500 times to respond to situations involving violence related to the service of alcohol between 2008 and March 2020 at the Fairmont in general.

Ogie Ugbeva

Ugbeva testified that he is a licensed security officer who began working as a security/loss prevention officer in April of 1998. He then started working at the Plaza Hotel in 2008. He averred that upon commencing employment at the Fairmont he was provided with training by Orlando Carreras as to how to deal with intoxicated patrons. He explained the procedure he was taught as

first seeing if you could calm the person down and, if that does not work, get a manager involved and call for backup security officers. He said that he was not instructed in identifying signs of intoxication. To make those assessments he would see if the potentially intoxicated person is stumbling, going from table to table harassing others, and if other patrons or attendees would complain to him that someone is a concern.

With respect to working CPS event assignments, Ugbeva demonstrated that he was a likely candidate because he was working the morning shift and had the seventh most seniority. He said that back then, the responsibility of working a CPS event was serving as a fire guard. He claimed that as a fire guard his responsibility before an event was to do a patrol of the event space to ensure that the exits were not blocked and that the exit signs were working. Once the event started his responsibility was to make sure guests were not smoking cigarettes and that the event did not run above the venue safe occupancy. He then clarified that in addition to serving as a fireguard, a security officer may be hired by CPS as additional security for an event. Additional security would patrol the event and would also be looking for people that are smoking cigarettes, people who are intoxicated, and just making sure the event is calm and running smoothly.

Ugbeva initially did not recall if he worked the Thobani wedding in any capacity. He was then shown a payroll document indicating that he did, but still could not recall if he worked the wedding or as a fire guard or as an additional security officer. It also was not completely clear whether he worked for two hours and got paid for four hours as a union overtime benefit, or if he worked for four total hours. However, upon closer inspection and realizing he would not leave an event to clock out and clock in at the same time, he was pretty certain that he worked for four hours, from 6PM to 10PM. Still, he did not even learn about the subject accident until either Orlando Carreras or Jonathan Gros was deposed and then briefly spoke to him. He did not think

that any incident transpired before he left at 10PM. Ultimately, he had no recollection of any of the alcohol service at the Thobani wedding.

Nevertheless, he did state that the fire safety officer would still have an obligation to intervene at an event where a guest became intoxicated because a fire guard still has the responsibilities of a security officer. He explained that if he noticed that a guest was intoxicated, he could go to a bartender and ask him to stop giving drinks to the person. He further explained that CPS would give the security instructions for how to act. For example, to speak to a manager when you run into problems with an intoxicated guest, how to behave, where to position yourself. Specifically, he stated that if he noticed that a bartender was serving an already intoxicated patron more liquor, he would get the managers involved. It would be the CPS manager's responsibility to stop service, calm down the guest, or decide if the guest should be removed. He believed that stopping the bartenders from overservice was also regular procedure in the Fairmont security manual. Ugbeva admitted that he had to intervene like this maybe 10 or 15 times out of the 40 or 50 CPS events in which he served as additional security or as a fire safety guard.

Aly Thobani

Aly Thobani testified that he married his wife Nicole on September 14, 2012 at the Plaza Hotel. They picked the Plaza Hotel in large part due to its beauty, location for international guests, and ease at which Emily Reifel could assist them in planning for the wedding while they were living hectic lives in London. Aly claimed he was told repeatedly that his job was just to enjoy his wedding that the "Plaza" had everything else under control. Aly explained that when he thinks of Emily Reifel, he thinks of her as an agent of the hotel and does not separate CPS from the hotel in his mind. He said that they were guided entirely by Reifel's suggestions as to what they needed, and they relied on her judgment in putting everything together. He alleged that they listened to her

suggestions on everything including things like lighting, flowers, ice sculptures, food, wine, and premium alcohol. Aly did aver, however, that Reifel did not make any recommendations with respect to security needs for the wedding. He stated that it was his and Nicole's idea to hire an additional security officer a day or two before the wedding.

He explained that the purpose of hiring an additional security officer was to assuage his ill mother's anxiety. As the wedding was approaching, Aly's father recently re-married. Aly's mother had a lot of anxiety about Aly's father's new wife attending the wedding. Aly averred it was his hope that his mother would let her attend, but it was causing her too much anxiety and panic. Aly said he made clear to his father that his new wife was not welcome at the wedding. Nevertheless, he alleged that rumors were circulating that she would attend anyway. Aly testified that, as a result, he promised to his mother that he would arrange for an extra security officer to keep his dad's new wife away from the wedding. He further explained that it was because of this purpose that he figured hiring the security officer for four hours was sufficient. He surmised that if the father's new wife did not appear in the first four hours of the wedding, she was not going to attend at all. He also recollected that four hours was the minimum amount of time he could hire an additional security officer.

As for the wedding itself, Aly recalled on the morning of the wedding day that his groomsmen arrived at his hotel room prior to 12PM with their suits to get ready. He remembered that Emily Reifel met them at noon to remind them about the itinerary and bring them little triangle sandwiches that he believed the Plaza package routinely provided for. He believed that water was also provided but answered in the negative when asked if any other beverages were provided. Additionally, when asked if any of the groomsmen brought or consumed any alcohol he answered "no." Specifically, he stated that John Yahara's face did not appear to be flushed and he did not

have the smell of alcohol on his breath. He also stated that he never learned that one of his uncles provided the bridesmaids with a bottle of champagne and that no one did the same for the groomsmen.

Aly then recalled that after everyone was dressed, they started taking pictures prior to the event so that they could actually enjoy the wedding. After taking bridal party and family photographs, Aly said that he and Nicole went to Central Park for more photographs, but he was not sure what the bridal party did as there was nothing scheduled for them at the time. Thereafter, he said that he and Nicole waited in the Campbell suite area before the ceremony began. At the suite he was visited by guests and accompanied by a vicar and Emily Reifel. Aly stated that there were sandwiches and water there too, but no alcohol. He said that alcohol did not start until 6PM or the reception. He did not believe that alcohol was available to guests during the ceremony either.

As for his drinking during the reception, Aly stated that he did not drink much since he is a conservative drinker and did not want to do anything embarrassing on his wedding day. He recalled, however, that he did not have to wait at the bar, that he had "Plaza personnel" who would attend to him. He remembered that if there was a toast, they would pour half glasses of champagne. If he was sitting at the table and food came, they would ask if he would want red or white wine. He recalled that there was a toast at the end of each speech and after the cake cutting. Aly believed that there were three to four toasts total.

Aly confirmed that, just like with planning the wedding, his role, once it started, was to enjoy his wedding and that he was not expected to be responsible for monitoring the activities at his wedding. Additionally, he stated that people were constantly vying for his attention and that he only had a little bit of time to himself. He averred that he did not engage in any kind of effort to gauge how much alcohol was being consumed during his wedding.

He did see people drinking though, as it was an open bar after all. One of the people Aly saw drinking was Nicole's half-brother, John Yahara. He alleged that he did not make an effort or have time to pay attention to how much alcohol John Yahara had been drinking. However, Aly did testify that he saw John consuming alcoholic beverages on repeated occasions. He further stated that after seeing wedding videos and photos that it was fair to say that he saw John on multiple occasions with alcoholic beverages, or what appeared to be alcoholic beverages in his hands. However, he did not know whether the soda glasses were different from the alcohol glasses and he did not know specifically what John was drinking. He especially did not recall seeing a Red Bull can that night. Despite not knowing what was in John's glasses throughout the night, he believed that it was alcohol. Aly did recall that John participated in the toasts that were given and that he consumed champagne during them. He did not recall whether he saw John Yahara taking shots. Aly also stated, however, that he never observed John acting or looking in a way that made him believe that he was intoxicated. Aly stated that he did not notice towards the end of his wedding that John Yahara's clothing was disheveled, nor did he have occasion to notice whether John Yahara was sweating. He also had no recollection that John's cheeks were flush or that his pupils were dilated. He also believed that Hector Lorenzo was drinking alcohol but did not know how much he consumed. In hindsight, he believed that Hector probably drank more than he should have, however, at the wedding he did not recall thinking that Hector was drunk.

He stated that he did not pay attention to anyone's alcohol consumption other than himself. In his opinion, there were just two people who overdrank while everyone else was just drinking and having fun. These two people were Nicole's aunt Barbara a/k/a Barb and another lady named Maureen. Specifically, Aly remembered Barbara speaking to him very close to his face and slurring her words. As for Maureen, he noticed that she was walking oddly and shouting a bit. Aly testified

that after noticing that they may be drunk he did not notice whether they continued to be served alcohol. He further stated that he did not know it at the time, but years later he learned that someone, likely aunt Barbara, vomited in the Campbell suite that night. He believed that the vomiting was likely caused from drinking alcohol. Aly further averred that he never has learned, to the time of his deposition, that any guests were cut off from alcohol service at the wedding.

He also said that he did not observe whether or not bartenders were obtaining IDs from any wedding guests to check whether they were underage. There were a small handful of guests, including Nicole's approximately 18-year-old half-brother Richard Jackson, that were underage. Aly recalled seeing Richie with a drink in his hand but was not sure what he was drinking. He also thought that Richie participated in the toasts that occurred at the wedding. In retrospect, he now believed that Richie may have been drinking alcohol. Aly did not believe Emily Reifel or anyone at the Plaza ever asked him for information about how many underage people he was expecting at the wedding.

Aly testified that he eventually learned, near midnight, from CPS manager Max that a guest was punched by Nicole's half-brother John. He did not learn that it was Hector Lorenzo until approximately just after midnight from Emily Reifel. Even then, Aly said that he did not learn of the extent of the injuries until he was back in London. Aly did not know that the plaintiff was taken away by ambulance, taken to a hospital, or required to undergo surgery. From his observations, Aly did not think that Hector Lorenzo was disruptive in any way. Specifically, Aly did not believe that anyone, let alone Hector, disrupted the cake cutting portion of the wedding. Aly also averred that he did not believe that security was still there at the time of the incident since they only requested assistance for four hours.

In investigating what happened thereafter, Aly was told that John Yahara was upset by Hector Lorenzo and perceived him to be acting obnoxiously. Aly claimed that over the years he heard various stories about what happened. He was told by Billy, then boyfriend of Nicole's sister Danielle, that Hector was rude to John, that Hector had been drinking, and that they decided to go to the fire exit where they got up in each other's faces and argued before the punch was thrown. Aly alleged that he was also told a similar story from Nicole's brother Justin. Aly also claimed he heard that John punched Hector because Hector said that one of Nicole's brother's drinks was a "girl drink." Aly stated that John apologized to him after the wedding and just said that he was not thinking at the time. He added, however, that no one has ever told him that John Yahara was intoxicated that night.

Nicole Yahara Thobani

Nicole Yahara Thobani testified, among other things, that while she attended Monmouth University back in 2002 she worked at a Chili's. While at Chili's, one of the things she did was serve alcoholic beverages. As a result, she had a basic recollection of the type of glassware that she would serve the alcoholic beverages in. She also testified that as a server she would not serve alcoholic drinks to a 17-year-old and knows that it would be inappropriate to do so.

With respect to her wedding, Nicole recalled that there were two bars and somewhere between 2 and 10 bartenders. She remembered there being champagne for toasts and wine being served during dinner but could not recall whether there were wine glasses, wine bottles, or both already on the table. She recalled there being numerous toasts but did not remember if the glasses were constantly refilled after each one or if they were filled to the top when filled.

Nicole thought that her half-brother John Yahara consumed champagne during the toasts, although, she did not remember actually seeing it. She also believed that her underage younger half-brother Richard Jackson had champagne during the toasts as well.

Nicole was shown a series of photographs and video captures from her wedding. One photograph she recognized as a dance she had with her father. In that photograph Nicole noticed John Yahara drinking at the bar towards the right side of the photograph. Nicole was shown another picture of John Yahara's place setting that appeared to show a water glass, a wine glass, a champagne flute, and another stemware or mixed drink with a straw in it. She stated that she believed John to be drinking wine when it was served with dinner and champagne with the toasts, but she was not particularly focused on him and his drinking and did not remember witnessing his drinking. While she could not be positive, Nicole assumed the pictured drink with a straw was a mixed drink with alcohol. Nicole was shown another photo where John Yahara had a tall cylindrical glass during the cocktail reception. To Nicole this appeared to her to be an alcoholic mixed drink. She was also shown another video capture from the cocktail reception where John Yahara had a cylindrical glass with a straw in it and came to the same conclusion. Nicole was shown other photographs where John had cylindrical glasses with straws or stirrers in his hands. Nicole was also shown pictures where John was holding a glass that did not have a straw or stirrer. She believed that the inclusion of a stirrer usually meant the drink was alcoholic. She also conceded that it was possible that someone could remove a stirrer from a drink. In other pictures shown to her, Nicole commented that she noticed the flushness or redness in John's cheeks and ears, some degree of perspiration, that he was not wearing his cummerbund correctly, and a stain on his shirt. Nicole was also shown a variety of photographs where in each one she was either dancing with someone else on the dance floor or she or her husband were wearing different clothing, indicating

the passage of time. In each differentiated picture Nicole noticed that John was in the background, by the bars and with drinks that appeared to be alcoholic in his hands. She agreed that she saw John Yahara drinking various mixed drinks throughout the wedding video. As a result of all these photos and video captures from different times, Nicole concluded that it looked like John Yahara was overserved.

All that being said, she also admitted that she did not know with total certainty what John Yahara was doing at the bar or what was in any of the glasses. She also had no idea if the bartenders were watering down his drinks. Nicole was not sure if you could get non-alcoholic drinks from the bars, but believed they were available. She also agreed that it was possible that John Yahara was red faced and appeared disheveled from dancing during the night. Nicole was further unsure if John was holding the same glass throughout the entire night, in all the pictures, and stated that she never saw him put down a finished glass at any point.

In another picture from the cocktail hour, Nicole could see Richard Jackson drinking a mixed drink but could not tell if there was alcohol in it. Nicole was shown another picture where Richard had the same type of glass with a straw, and she was unable to tell if the drink was just juice or alcoholic. However, based on her knowledge of stemware from her time at Chili's, she believed the drink was an alcoholic beverage. She was also shown a picture of Richard with a glass that did not have a straw or stirrer. She was then shown a few other photos from different times in the night with Richard Jackson and she concluded that it appeared that he was consuming alcoholic beverages. However, she admitted that it was only her assumption that these drinks were alcoholic. Nevertheless, Nicole did not recall thinking on the night of the wedding that he looked like he drank too many alcoholic drinks. She further stated that she never witnessed Richard Jackson at the bar ordering drinks at any point at the wedding reception or cocktail hour. Even assuming that

Richard was drinking alcoholic drinks, Nicole was not sure if they were delivered to him from the bartenders directly or from some other source that the bartenders could not readily observe. She supposed the same was possible with respect to John Yahara. As was the case with John, Nicole was also unsure if the number of photos and video captures with Richard holding a glass was representative of the number of drinks he consumed. She did notice that there were at least two different types of glasses he held at different times though. Additionally, Nicole was not told and did not know whether Richard was drinking screwdrivers or taking lemon drop shots.

Nicole did not recall whether anyone was taking shots but believed that shots would be provided if a guest asked for it. She further testified that she never learned that any of her guests were refused alcohol service or ejected from the wedding. She also could not recall but learned during the course of these depositions that her aunt Barbara vomited in the Campbell suite.

Nicole then testified that she did not learn about the subject incident with plaintiff until the next day after her wedding night. She believed there was an effort to keep the news from her. She did not recall John Yahara becoming belligerent, animated, loud, or boisterous or touching other guests during the wedding. Nicole did notice, however, that various pictures from different times in the night depicted John's mood changing from happy to more serious. She also noticed a photo where John seemed to be shouting. Ultimately, Nicole could not conclude whether John's perceived overservice had any relationship to the incident with Hector Lorenzo.

Over the years Nicole alleged that she heard stories, specifically one from her sister Danielle, that Hector was saying things to John that he should not have. Nicole did aver though that John apologized to Aly a couple of years later.

With respect to the hiring of security, Nicole verified that the sole purpose was to prevent the possible entrance of the new wife of her husband's father. She averred that the security guard

was hired just for the first four hours as they assumed that Aly's father's new wife would crash the event early on if she would crash at all. Nicole could not remember seeing the security guard and had no idea where he was stationed.

Sworn Statement of Chris Jones

Chris Jones attended the Thobani wedding on September 14, 2012 as a guest and observed John Yahara visibly intoxicated before the end of the cocktail hour. Jones averred that although John Yahara was visibly intoxicated, he was still being served vodka and red bull drinks. Jones alleged that he could tell John Yahara was drunk because his speech was slurred, his eyes were glassy, and Yahara was loud and boisterous. He further added that at 11:45 PM he witnessed John Yahara run towards Hector Lorenzo and sucker punch him in the face.

Dram Shop Act

With his motion, plaintiff seeks summary judgment against defendants CPS 5 and Fairmont on the grounds that defendants violated the Dram Shop Act. Similarly, defendants also move to dismiss plaintiff's Dram Shop Act claim arguing that there was no evidence that John Yahara was served while visibly intoxicated.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating that absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). In determining whether summary judgment is appropriate, all

reasonable inferences should be construed in favor of the non-moving party (*see Garcia v J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept 1992]).

N.Y. Gen. Oblig. Law § 11-101(1), often referred to as “the Dram Shop Act,” states:

Any person who shall be injured in person, property, means of support, or otherwise by an intoxicated person, or by reason of the intoxication of any person . . . shall have a right of action against any person who shall, by . . . unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

In order for a defendant to be free from liability under the statute, they must demonstrate that they did not serve alcohol to an assailant who was visibly intoxicated or that there was no reasonable connection between the service of the alcohol to the assailant and the assault and battery of the plaintiff (*see Ricaurte v Inwood Beer Garden & Bistro Inc.*, 165 AD3d 586 [1st Dept 2018]). In order for a plaintiff to succeed on a summary judgment motion under the Dram Shop Act, it must demonstrate that defendant provided alcohol to a person who was visibly intoxicated, and that the service had at least some reasonable connection to the resulting damages (*see Catania v 124 In-To-Go, Corp.*, 287 AD2d 476 [2d Dept 2001]; *Breton-Diaz v Calico Jack's LLC*, 2016 WL 341516 [NY SUP] [Sup Ct, New York County 2016]). Circumstantial evidence can be used to demonstrate that someone was “visibly” intoxicated (*see Adamy v Ziriakus*, 92 NY2d 396 [1998]; *Romano v Stanley*, 90 NY2d 444 [1997]). However, “[p]roof of mere consumption of alcohol is not enough to defeat a [defense] motion for summary judgment in a Dram Shop action” (*Costa v 1648 Second Ave. Restaurant Inc.*, 221 AD2d 299 [1st Dept 1995] quoting *Pizzaro v City of New York*, 188 AD2d 591 [2d Dept 1992]). Likewise, a factual determination of intoxication cannot be made solely on how much alcohol a person consumed, since the effects of alcohol consumption may differ greatly from one person to another (*see Senn v Scudieri*, 165 AD2d 346 [1st Dept 1991]).

citing *Baginski v New York Tel. Co.*, 130 AD2d 362 [1st Dept 1987]). It is further well settled that an intoxicated person cannot maintain a cause of action under the Dram Shop Act for injuries sustained as a result of that person's own intoxication (*see Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629 [1989]; *Moyer v Lo Jim Caf , Inc.*, 19 AD2d 523 [1st Dept 1963]; *Oursler v Brennan*, 67 AD3d 36 [4th Dept 2009]).

Here, defendant CPS 5 merely argues that they are entitled to summary judgment because there is no proof that John Yahara was served while visibly intoxicated. In doing so, defendants failed to offer affidavits from any of the bartenders working the night of the wedding, attesting that they never served Yahara or that Yahara did not appear visibly intoxicated when served (*see Cohen v Bread & Butter Entertainment LLC*, 73 AD3d 600 [1st Dept 2010]; *McGovern v 4299 Katonah Inc.*, 5 AD3d 239 [1st Dept 2004]; *Duran v Poggio*, 244 AD2d 162 [1st Dept 1997]). "A defendant seeking summary judgment has the burden of establishing its prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, not merely pointing to gaps in the plaintiff's proof" (*see Tansey v Coscia*, 2015 WL 13707558 [NY Sup][Sup Ct, Suffolk County 2015] *affd* 159 AD3d 850 [2d Dept 2018]). Moreover, even if defendant CPS 5 had met its initial burden, plaintiff's submissions, to the effect of pictures and testimony demonstrating John Yahara holding alcoholic drinks and in other ways appearing visibly intoxicated with flush cheeks, a sweaty head, and disheveled clothing, suffice to raise an issue of fact as to whether defendant served alcohol to a visibly intoxicated person (*see McGovern v 4299 Katonah Inc.*, 5 AD3d 239 [1st Dept 2004]). Accordingly, CPS 5's motion for summary judgment, dismissing the Dram Shop claim is denied.

On the other hand, that branch of Fairmont's motion for summary judgment to dismiss the Dram Shop Act claim is granted without any opposition. It is undisputed that Fairmont was not the entity responsible for serving alcohol at the wedding event.

As for the branch of plaintiff's motion seeking summary judgment on the Dram Shop claim, triable issues of fact preclude summary judgment. Here, plaintiff testified that he witnessed John Yahara having numerous alcoholic drinks and shots, and that he was loud, boisterous, and disruptive from the beginning of the evening and only drew more attention to himself as the night went on. There were numerous photographs and video screen captures submitted demonstrating that John Yahara was by the bar at different times of the night with a glass in hand containing a cocktail stirrer. Chris Jones also swore that John Yahara appeared visibly intoxicated. Nicole Yahara Thobani testified after being shown numerous photographs of John that night that he appeared sweaty, flush in the face, and disheveled. She added that his temperament seemed to change from jovial to more serious throughout the night and that it appeared that he was overserved.

Nevertheless, she also averred that she did not recall John becoming loud, boisterous, or touching others throughout the night. She also admitted that she did not know with total certainty what John Yahara was doing at the bar, what was in any of the glasses he was holding, if it was the same glass, if he finished any of the glasses, or if his drinks were watered down or non-alcoholic. She also agreed that it was possible that John Yahara was red faced and appeared disheveled from dancing during the night. There were also photographs or video captures that showed him dancing. When asked, Nicole was unsure if John's perceived overservice had any relationship to the altercation with plaintiff. Aly Thobani also testified that he never saw John look or act in any way that made him believe that he was intoxicated on his wedding night. Likewise,

Vincent Palumbo testified that based on his discussions with one of the bartenders, Cepero, that he did not believe John Yahara was intoxicated.

Plaintiff also testified that he, himself, had approximately 15 alcoholic beverages and described himself as intoxicated but not drunk that night. Aly Thobani averred that, in hindsight, he believed that Hector Lorenzo probably drank more than he should have. Both Aly and Nicole recalled hearing throughout the years from others, including Nicole's sister and her husband, that John punched Hector because Hector was saying things that he should not have said. Palumbo also recalled hearing from one his managers, Romero, that Lorenzo was talking or laughing during speeches and that John Yahara took offense to that. Similarly, plaintiff also testified that he remembered after he was punched in the face that John was yelling that he was being disrespectful, although he did not believe he was. Thus, even if there were not questions about whether John Yahara was visibly intoxicated when served at the wedding, there are also triable questions of fact as to whether any overservice is related to the subject altercation or whether plaintiff's own intoxication and overservice was a disqualifying cause. Accordingly, that branch of plaintiff's motion for partial summary judgment on the Dram Shop claim is denied.

Negligence

Generally, landowners have a duty to act in a reasonably prudent manner to prevent harm to those on their property (*see D'Amico v Christie*, 71 NY2d 76 [1987]). Specifically, landowners have a 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" (*id.*). Accordingly, a landowner may be liable for the actions of an intoxicated guest on the landowner's property where the landowner had the opportunity to supervise an intoxicated guest and is reasonably aware of the need for such supervision and control (*id.*). There is no greater burden on

a nightclub, bar, or wedding operator than there is for any other premises' operator (*see Zamore v Bar None Holding Co., LLC*, 73 AD3d 601 [1st Dept 2010]). As a result, there is no breach of a duty to a patron or guest, or corresponding liability, when an incident is attributable to a sudden, unexpected, and unforeseeable attack (*id.*).

Here, notwithstanding whether Fairmont had control of how and in what manner drinks were served to guests in the ballroom or whether CPS 5 had control of the third-floor stairwell "F" where the altercation took place, the assault on plaintiff was sudden and unforeseeable. While there may have been evidence of drinking throughout the night, there was no admissible evidence adduced demonstrating that John Yahara, or anyone for that matter, exhibited violent tendencies throughout the night. Plaintiff even testified that he was shocked when he was punched by John Yahara and that he did not know why it happened. He averred that he did not get into any altercation with Yahara. He thought that after he gestured to Yahara, that they were going to walk together to take a shot of liquor. Similarly, Chris Jones swore in his statement that John Yahara sucker punched the plaintiff. Accordingly, that branch of the plaintiff's motion for summary judgment on the negligence cause of action is denied and those branches of the defendants' motions for summary judgment seeking to dismiss the negligence cause of action are granted (*see Lewis v Jemanda New York Corp.*, 277 AD2d 134 [1st Dept 2000]).

Bride and Groom Motion

Third-party defendants Aly Thobani and Nicole Yahara Thobani also move for summary judgment dismissing third-party plaintiff CPS 5's claims with respect to contractual indemnification, common law indemnification, and common law contribution and third-party plaintiff Fairmont's claims as to common law indemnification and contribution. In support of their motion, they submit and refer to, inter alia, the aforementioned deposition transcripts.

Among other things, Aly Thobani averred that he signed the contract booking the Plaza Hotel for his wedding after only skimming the contract to make sure the original date was right, and the price was right. He stated that neither he nor his wife were attorneys, and that they did not hire an attorney to review the contract. He stated that it was not suggested by Emily Reifel that he hire an attorney to review the contract. He believed the contract was nonnegotiable. Nicole Yahara Thobani also testified that she did not fully review the contract. She claimed that she only paid attention to the dates and what was included in the wedding package. She did not even recall signing the contract. Nicole stated that she did not ask a lawyer to review the contract and did not recall asking for any changes to be made to the contract.

As previously mentioned, Aly Thobani testified that nearly all the wedding planning came from suggestions from Emily Reifel. He was told by her that that they were in good hands with her and the Plaza Hotel, and that all they had to do was focus on enjoying the event.

Reifel testified that she did not recall suggesting to the Thobanis that they could retain counsel to review the agreement. She also agreed that they had no choice but to sign the agreement if they wanted to hold their wedding at the Plaza Hotel. Additionally, Reifel acknowledged that by the last sentence of paragraph three of the standard terms and conditions that CPS 5 wanted the Thobanis to sign the agreement quickly or they would release the hold on the event space.

Reifel was also asked if there was anything the Thobanis did carelessly or recklessly, or did not do, that could have prevented the incident, and she responded that she did not know.

Ugbeva and Gros both testified that neither received instructions on how to act from the bride and groom.

Nicole Yahara Thobani and Aly Thobani are entitled to summary judgment, dismissing CPS 5's contractual indemnification claim. General Obligations Law ¶ 5-322 states:

Every covenant, agreement or understanding in or in connection with or collateral to any contract entered into with any cater or catering establishment exempting the said caterer or catering establishment from liability for damages caused by or resulting from the negligence of the caterer or catering establishment, his agents, servants, employees or patrons at the affair contracted therefor, shall be deemed to be void as against public policy and wholly unenforceable.

Thus, it is of no consequence that Section 17 of the contract between the Thobani's and CPS 5 requires the Bride and Groom to indemnify and hold CPS 5 harmless for claims "arising from or concerned with the Event except to the extent that such Claims are caused by our gross negligence or willful misconduct" since this provision is "wholly unenforceable" against CPS 5 who is indisputably a caterer (*see Lustig v Congregation B'Nai Israel of Midwood*, 65 Misc2d 1052 [Sup Ct, Kings County 1971]; *Hershkowitz v Menorah Caterers, Inc.*, 72 Misc2d 199 [Civ Ct, New York County 1972]).

Furthermore, to the extent that the plaintiff's negligence claim has been dismissed since the assault was sudden and unforeseeable, there cannot be any requirement for contribution or indemnification on those claims (*see Vincente v Roy Kay, Inc.*, 35 AD3d 448 [2d Dept 2006]). Likewise, third-party defendants are entitled to dismissal of the common law contribution and indemnification claims since there was no evidence adduced demonstrating that the third-party defendants were negligent (*see Trustees of Columbia University v Mitchell/Giurgola Assoc.*, 109 AD2d 449 [1st Dept 1985]; *Smith v Sapienza*, 52 NY2d 82 [1981]). Here, after numerous depositions, each person deposed testified that the bride and groom did not do anything negligently and did not direct, control, or supervise the event or service of alcohol. Moreover, the only viable

claim remaining is the Dram Shop Act claim against CPS 5, which as an active wrongdoing is not susceptible to indemnification from others (*see Anderson v Comardo*, 107 Misc2d 821 [Sup Ct, Livingston Cty 1981]). In opposition to third-party defendants' prima facie showing, the third-party plaintiffs failed to raise a triable issue of fact. Thus, all claims for indemnification and contribution in the third-party complaint are dismissed.

Accordingly, it is ordered that plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant CPS 5's motion for summary judgment, dismissing plaintiff's complaint, is granted solely to the extent that plaintiff's cause of action sounding in negligence is dismissed; and it is further

ORDERED that defendant Fairmont's motion for summary judgment, dismissing plaintiff's complaint and any cross claims as to the Fairmont entities, is granted in its entirety; and it is further

ORDERED that third-party defendants' motion for summary judgment is granted and all causes of action sounding in contribution and indemnification are dismissed from the remaining third-party complaint; and it is further


ORDERED that the motions are denied in all other respects; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

12/15/2021

DATE


Hon. Richard G. Latin, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: