At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December, 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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CHRIS AVILA,

Plaintiff,

Index No. 510558/2017

- against -

DECISION AND ORDER

GITA GANESH RAM RESTAURANT CORP., SHIPWRECK REALTY LLC, SAK MANAGEMENT CORP., MAS SECURITY ASSOCIATES, INC. and CAMERHON DUVERGER

Motion Sequence #3, #4, #5, #6

Defendants,

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	68-82, 84-93, 127-135, 138-144, 145,
Opposing Affidavits (Affirmations)	99, 103-108, 109-114, 147-150, 151-154,
Reply Affidavits (Affirmations)	95, 96, 118, 155,
Memorandum of Law	94, 102, 158-160

After a review of the papers and oral argument the Court finds as follows:

The Plaintiff Chris Avila (hereinafter the "Plaintiff") alleges in his complaint that on August 26, 2016 he suffered personal injuries after allegedly being harassed and assaulted both inside and in front of a restaurant and nightclub purportedly located at 120-04/06 Rockaway Boulevard in Queens N.Y. (hereinafter referred to as the "Property"). The Plaintiff raises causes of action for assault and battery, negligent security, negligent infliction of emotional distress, negligent hiring and supervision and intentional infliction of emotional distress.[1]

[1] As an initial matter, motions sequence #5 and #6 which seek, inter alia, to restore motions sequence #3 and #4 after both were previously marked off are granted.

Defendant MAS Security Associates, Inc. (hereinafter "Defendant MAS") now moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint and all cross-claims against it. Defendant MAS contends that it did not owe the Plaintiff a duty of care with respect to the incidents that allegedly occurred on August 26, 2016. Specifically, Defendant MAS argues that it was not responsible for the alleged assault against the Plaintiff and the person that the Plaintiff claims assaulted him, Defendant Camerhon Duverger (hereinafter "Defendant Duverger"), although an employee of Defendant MAS, was not at the Property during his working hours. Defendant MAS also contends that it cannot be held liable for negligent hiring of Defendant Duverger, since it did not have notice of any violent propensities and as a result was not liable for any related claim for negligent security.

Defendants Gita Ganesh Ram Restaurant Corp. (d/b/a Flamingo & Mantra Lounge NYC) and Shipwreck Realty, LLC (hereinafter referred to collectively as the "Restaurant Defendants") cross-move (motion sequence #4) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint and all cross-claims as against it. The Restaurant Defendants also seek summary judgment on their counterclaim as against Defendant MAS, asserting a common law right of indemnity against MAS. The Restaurant Defendants argue that they are not liable as a matter of law for the claims made by the Plaintiff since the allegations made by the Plaintiff occurred off the Property and by someone who was not at the Property in their capacity as an employee of the Restaurant Defendants or Defendant MAS. The Restaurant Defendants adopt and rely on many of the same arguments and exhibits and for the sake of judicial economy their application will be treated together with that of Defendant MAS. Those issues not common to both will accordingly be addressed separately.

The Plaintiff opposes both motions in one affirmation in opposition and argues that both motions should be denied. The Plaintiff contends that these motions should be denied as he contends that he was

assaulted by several security guards who were employed by Defendant MAS. The Plaintiff contends that the employees of Defendant MAS were the aggressors and pushed the Plaintiff from the Property onto the street. The Plaintiff further contends that as it relates to Defendant Duverger, Duverger admitted to the NYPD investigators that he was present at the Property as an employee and participated in the events at issue. As a result, the Plaintiff contends that Defendant MAS is liable for Duverger's actions under the principle of *respondeat superior*. The Plaintiff contends that this liability also extends to the Restaurant Defendants and that even if the Restaurant Defendants had instructed the security guards to refrain from physical contact with customers, this is not sufficient to argue that the guards were acting outside the scope of their employment.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N..E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

First Cause of Action- Assault and Battery

"Pursuant to the doctrine of *respondeat superior*, an employer can be held vicariously liable for torts committed by an employee acting within the scope of employment." *Horvath v. L&B Gardens, Inc.,* 89 A.D.3d 803, 803, 932 N.Y.S.2d 184, 185 [2d Dept 2011]. "Intentional torts as well as negligent acts may fall within the scope of employment." *Hoffman v. Verizon Wireless, Inc.,* 125 AD3d 806, 806–07, 5 N.Y.S.3d 123, 125 [2d Dept 2015]; *see also Marilyn S. v. Indep. Grp. Home Living Program, Inc.,* 73 AD3d 895, 904 N.Y.S.2d 70 [2d Dept 2010]. "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment." *Davis v. Larhette*, 39 A.D.3d 693, 694, 834 N.Y.S.2d 280, 283 [2d Dept 2007]. "When businesses hire security guards or bouncers to maintain order, the physical force used by those bouncers may be within the scope of their employment." *Fauntleroy v. EMM Grp. Holdings LLC*, 133 AD3d 452, 453, 20 N.Y.S.3d 22, 23–24 [1st Dept 2015].

Turning to the merits of the motion by Defendant MAS (motion sequence #3) as it relates to the Plaintiff's claim for assault and battery, the Court finds that there is an issue of fact regarding whether the

actions of the security guards were foreseeable. The moving defendants contend that they are not responsible under the doctrine of *respondeat superior* because the person that was identified as having assaulted the Plaintiff was not on duty at the time the incident occurred and as a result could not have been acting in within the scope his employment. In support of their position, the moving defendants rely primarily on the deposition of the Plaintiff and the deposition of Keith Bullock, Defendant MAS supervisor. During his deposition, the Plaintiff testified to an initial disagreement with a person at the restaurant, "CJ," who began to get aggressive concerning the Plaintiff and his friends remaining inside on the second floor, after which he and his friends began walking to the exit. (see Defendant MAS motion, Exhibit H, Pages 40-44). He further states that CJ was with other security guards during that time, and that the guards were walking behind the Plaintiff and the people he was with as they were leaving. The Plaintiff stated that during this time the guards were cursing at his girlfriend. He also stated that the guards were pushing him. "Shoving me, pushing me." (Pages 45-47). The Plaintiff indicated that at some point the guards were interspersed with him and his friends. "They continued to push me and then as soon as we get to the sidewalk, we tell them we are on the sidewalk already, stop pushing and they continued to push." (Page 50). The Plaintiff stated that he was repeatedly pushed by the security guards after he had left the Property, and that he physically did not contact the guards. (See Pages 55 through 56). "I remember being grabbed -- I remember being grabbed and pushed further into the street and surrounded and getting hit by the bouncer." "I think it was four or five." "...they were the same gentlemen upstairs and they were wearing security[sic]." Plaintiff stated that he was punched in the face (Pages 58-59).

During his deposition, Keith Bullock stated that he was a supervisor for Defendant MAS but was not present at the time of the incident. While Mr. Bullock did testify regarding any complaints against an employee named Camerhorn and testified in a conclusory fashion that Defendant Duverger was not working at the Premises when the incident occurred, he did not sufficiently testify regarding the actions

of the security guards involved in the incident and whether their actions were within the scope of their employment. (See Defendant MAS Motion, Exhibit J, Pages 43 through 45). What is more, testimony by Mr. Bullock that MAS generally instructed the security guards not to engage in physical altercations with customers "does not compel the conclusion that, as a matter of law, the security guard in question was acting beyond the scope of his employment when he allegedly assaulted the Plaintiff." *Jaccarino v. Supermarkets Gen. Corp.*, 252 AD2d 572, 572, 676 N.Y.S.2d 606, 607 [2d Dept 1998]; see also *Jones v. Hiro Cocktail Lounge*, 139 AD3d 608, 609, 32 N.Y.S.3d 156, 158 [1st Dept 2016]. As a result, the Court finds that there is an issue of fact that prevents the dismissal of the first cause of action for assault and battery against Defendant MAS.

However, the Court finds that the Restaurant Defendants have met their *prima facie* burden as it relates to their application to dismiss the first cause of action for assault and battery. The Restaurant Defendants contend that they had no supervision or control over the security guards hired by Defendant MAS and as a result they cannot be held liable as a matter of law for the assault and battery claim made by the Plaintiff. In support of their application, the Restaurant Defendants rely primarily on the affidavit and deposition of Suidass Dennis Sahai, the manager of Defendant Gita Ganesh Restaurant Corp. As part of his affidavit Mr. Sahai stated that "Gita Ganesh did not train the security personnel provided by Mas." Mr. Sahai also stated that "[n]either I, nor anyone else at Gita Ganesh, had ever been told, or was aware, that any of the personnel provided by Mas for services at Gita Ganesh had any prior criminal background and it was my understanding that a security guard license is confirmation of the absence of such a record." Mr. Sahai also stated that "[n]either I, nor anyone else from Gita Ganesh, instructed the Mas personnel how to address the situation that occurred outside the premises with plaintiff on the night in question." However, as stated above, the Plaintiff's claim regarding the actions of the security guards employed by Defendant MAS also took place on the Premises. The fact that Mr. Sahai may have asked for a certain

number of security guards or even if the Restaurant Defendants gave instructions to the security guards on how to conduct themselves, it would not render those security guards special employees such that the Restaurant Defendants would be liable for the Plaintiff's assault and battery claim. *See Kirkman by Kirkman v. Astoria Gen. Hosp.,* 204 A.D.2d 401, 402, 611 N.Y.S.2d 615, 616 [2d Dept 1994]; *McLaughlan v. BR Guest, Inc.,* 149 AD 3d 519, 520, 52 N.Y.S.3d 92, 93 [1st Dept 2017]. In opposition, the Plaintiff has failed to raise an issue of fact as it relates to the Restaurant Defendants application to dismiss the Plaintiff's first cause of action for assault and battery.

Second Cause of Action- Negligent Security

In general, "[a] possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties." *Bryan v. Crobar*, 65 AD3d 997, 999, 885 N.Y.S.2d 122, 124 [2d Dept 2009]. However, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults." *Kranenberg v. TKRS Pub, Inc.*, 99 AD3d 767, 768, 952 N.Y.S.2d 215, 217 [2d Dept 2012], *quoting Giambruno v. Crazy Donkey Bar & Grill*, 65 AD3d 1190, 1191, 885 N.Y.S.2d 724, 726 [2d Dept 2009]. While it is true that traditionally a landlord has a common law duty to take minimal security precautions to protect tenants and members of the public, that duty also has been extended to managing companies and security companies. *See Mason v. U.E.S.S. Leasing Corp.,* 96 N.Y.2d 875, 878, 756 N.E.2d 58, 60 [2001]; *see also Wayburn v. Madison Land Ltd. P'ship*, 282 AD2d 301, 303, 724 N.Y.S.2d 34, 37 [2d Dept 2001].

Turning to the merits of the motion by the moving defendants as it relates to the Plaintiff's claim for negligent security, the Court finds that the moving defendants have met their *prima facie* burden. Defendant MAS contends that this cause of action should be dismissed as it was the Plaintiff that was the

aggressor, that it provided sufficient security at the Premises, and that the actions of Defendant Duverger and the other guards were not foreseeable. In support of their position, Defendant MAS relies primarily on the deposition of the Plaintiff, and the deposition of Defendant MAS supervisor Keith Bullock. As part of his affidavit, Mr Sahai states that he is the Manager of Gita Ganesh Ram Restaurant Corp. and "has worked as the manager at Gita Ganesh since 2012 when Gita Ganesh first began operating at 120-06 Rockaway Boulevard in Ozone Park, Queens." Mr Sahai further stated that "[n]either I, nor anyone else at Gita Ganesh, had ever been told, or was aware, that any of the personnel provided by Mas for services at Gita Ganesh had any prior criminal background and it was my understanding that a security guard license is confirmation of the absence of such a record." As a result, the moving defendants have met their *prima facie* burden regarding the cause of action for negligent security. In opposition, the Plaintiff does not address the claim for negligent security in his Affirmation in Opposition and has therefore failed to raise an issue of fact that would prevent this court from dismissing the claim for negligent security.

Third Cause of Action- Negligent Infliction of Emotion Distress

"A cause of action to recover damages for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, 'generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety.'" *Santana v. Leith*, 117 AD3d 711, 712, 985 N.Y.S.2d 147, 149 [2d Dept 2014], quoting *Sheila C. v. Povich*, 11 AD3d 120, 122, 781 N.Y.S.2d 342, 345 [2d Dept 2004]. "By requiring a direct link between the mental injury and the defendant's negligence, and by mandating some guarantee of the genuineness of the emotional injury, the Court of Appeals has recognized a standard that is effective to filter out petty and trivial complaints and to ensure that the alleged emotional distress is real." *Taggart v. Costabile*, 131 AD3d 243, 253, 14 N.Y.S.3d 388, 396 [2d Dept 2015].

Turning to the merits of the motion by the moving defendants for negligent infliction of emotional distress, the Court finds that the moving defendants have met their *prima facie* burden. The moving defendants contend that this cause of action must be dismissed because the Plaintiff's claim is based upon the allegation that employees of Defendant MAS assaulted the Plaintiff and therefore committed an intentional tort against him. Courts have held that in situations where the allegations in the complaint allege intentional conduct and not negligence a claim for negligent infliction of emotional distress can not survive. *See Santana v. Leith*, 117 AD3d 711, 712, 985 N.Y.S.2d 147, 149 [2d Dept 2014]. In opposition, the Plaintiff does not address the claim for negligent infliction of emotional distress in his Affirmation in Opposition and has therefore failed to raise an issue of fact that would prevent this court from dismissing the claim for negligent infliction of emotional distress.

Fourth Cause of Action- Negligent Hiring and Supervision

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of *respondeat superior* and no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Quiroz v. Zottola*, 96 AD3d 1035, 1037, 948 N.Y.S.2d 87, 89 [2d Dept 2012], *quoting Talavera v. Arbit*, 18 AD3d 738, 738, 795 N.Y.S.2d 708, 709 [2d Dept 2005]. What is more, to establish a cause of action based on negligent hiring and supervision, it must be shown that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Jackson v. New York Univ. Downtown Hosp.*, 69 A.D.3d 801, 801, 893 N.Y.S.2d 235, 236 [2d Dept 2010], *quoting Kenneth R. v. Roman Cath. Diocese of Brooklyn*, 229 AD2d 159, 161, 654 N.Y.S.2d 791, 793 [2d Dept 1997].

The Court finds that the moving defendants have met their *prima facie* burden as it relates to its summary judgment application of the Plaintiff's claim for negligent hiring and supervision. The moving

defendants contend that the Plaintiff's cause of action for negligent hiring and supervision should be dismissed given that the Plaintiff claims that the security guards were either acting within the scope of their employment or because the moving defendants did not have knowledge that Defendant Duverger or the other guard had a propensity or history of violent conduct. During his deposition, when Mr. Bullock was asked if he was aware of any complaints against the security guards on staff the night of the incident, he stated "[n]ot complaints, just someone showed up late, normal complaints." When asked if there were any other complaints he stated "[s]melling bad, because a lot of these guys have different jobs as well and this is their second shift." This testimony is sufficient to show that, even assuming that the security guards were not acting within the scope of their employment, Defendant MAS did not have actual or constructive notice of the propensity for violence on the part of any of its employees. This is sufficient for Defendant MAS to meet its *prima facie* burden.

Mr. Sahai stated that "[n]either I, nor anyone else at Gita Ganesh, had ever been told or were aware that any of the personnel provided by Mas for services at Gita Ganesh had any proclivity towards violence." In opposition, the Plaintiff failed to raise an issue of fact that would prevent this court from dismissing the claim for negligent security.

Fifth Cause of Action- Intentional Infliction of Emotional Distress

The Court grants the application to dismiss the claim by the Plaintiff alleging intentional infliction of emotional distress by both Defendant MAS and the Restaurant Defendants. "To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so 'as to be regarded as atrocious and intolerable in a civilized society.'" *Leonard v. Reinhardt*, 20 AD3d 510, 510, 799 N.Y.S.2d 118, 119 [2d Dept 2005], quoting *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 480 N.E.2d 349 [1985].

Although the Court in *Leonard v. Reinhardt* dismissed the intentional infliction of emotional distress claim as duplicative of the assault claim, it also held that "[i]n any event, the complaint fails to allege extreme or outrageous conduct necessary to support such a claim." Similarly, in *Raymond v. Marchand,* the Court held that in a matter alleging assault "[a]s to the cause of action alleging the intentional infliction of emotional distress, the acts committed by the defendant did not rise to the level of extreme and outrageous conduct required to sustain that cause of action." *Raymond v. Marchand*, 125 AD3d 835, 836, 4 N.Y.S.3d 107, 108 [2d Dept 2015]. That is also true in this case. In opposition, the Plaintiff does not address the claim for intentional infliction of emotional distress in his Affirmation in Opposition and has therefore failed to raise an issue of fact that would prevent this court from dismissing this claim.

Cross-Claim for Common Law Indemnification

Turning to the merits of the Restaurant Defendants application for summary judgment on their cross-claim for common law indemnification, the Court finds that they have not met their *prima facie* burden. In general, "[t]he principle of common-law, or implied, indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party." *Arrendal v. Trizechahn Corp.,* 98 AD3d 699, 950 N.Y.S.2d 185, 186 [2d Dept 2012]. "If, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of the contractor, then the contractor may be held liable for indemnification to an owner." *Bellefleur v. Newark Beth Israel Med. Ctr.,* 66 AD3d 807, 808, 888 N.Y.S.2d 81, 83 [2d Dept 2009], *quoting Curreri v. Heritage Prop. Inv. Tr., Inc.,* 48 AD3d 505, 506, 852 N.Y.S.2d 278, 280 [2d Dept 2008]. In the instant proceeding, the action has been dismissed against the Restaurant Defendants and they have not established that Defendant MAS, as the proposed indemnitor, was responsible for the negligence at issue in any event. See *Konsky v. Escada Hair Salon, Inc.,* 113 AD3d 656, 658, 978 N.Y.S.2d

342, 344 [2d Dept 2014]. As such, the application for common law indemnity is denied at this time. None of the moving Defendants have addressed the viability and/or extent of the indemnity in the event the action is dismissed against the Restaurant Defendants.

Based on the foregoing, it is hereby ORDERED as follows:

The motions (motion sequence #5 and #6) to restore are granted.

The summary judgment motion by the Defendant MAS (motion sequence #3) is granted solely to the extent that the Plaintiff's claims of negligent security, negligent infliction of emotional distress, negligent hiring and supervision and intentional infliction of emotional distress are dismissed. The Plaintiff's claim (first cause of action) for assault and battery is not dismissed and shall continue.

The motion by the Restaurant Defendants (motion sequence #4) for summary judgment is granted solely to the extent that the complaint as against the Restaurant Defendants is dismissed and the application for summary judgment on the Restaurant Defendant's cross-claim for common law indemnity, if any, is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.