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| Gerth v Holiday Mtn. Ski & Fun |
| 2021 NY Slip Op 32940(U) |
| January 26, 2021 |
| Supreme Court, Dutchess County |
| Docket Number: IndexNo. 53690/18 |
| Judge: Maria G. Rosa |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

KEVIN M. GERTH,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 53690/18

HOLIDAY MOUNTAIN SKI & FUN and APPALACHIAN
MOTO JAM and "JOHN DOE", whose name is unknown,
said name being fictitious, and HOLIDAY MOUNTAIN
ACTION SPORTS, LLC, and TOPS PRODUCTION, LLC,
and HOLIDAY MOUNTAIN SKI & FUN PARK, INC.,

Defendants.

The following papers were read on Defendants' motion for summary judgment.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
AFFIDAVIT IN SUPPORT
EXHIBITS A - E
MEMORANDUM OF LAW IN SUPPORT

AFFIRMATION IN OPPOSITION
EXHIBITS A - I

REPLY AFFIRMATION

This is a negligence action in which Plaintiff seeks damages for injuries allegedly sustained when he was physically assaulted in the parking lot of the Holiday Mountain Ski & Fun Park in Rock Hill, New York. The incident occurred in the early morning hours of October 21, 2018. An event entitled the "Appalachian Moto Jam" was being held on a portion of the ski mountain over the weekend of October 20-21, 2018. Participants and spectators were permitted to spend the night in a parking lot on the site. Plaintiff alleges that at approximately 1:00 a.m. he encountered an intoxicated individual who became aggressive and then repeatedly punched him in the face and knocked him to the ground. Defendants move for summary judgment dismissing all claims.

The proponent of a motion for summary judgment carries the initial burden of tendering

sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, “the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant.” Szczerbiak v. Pilat, 90 NY2d 553 (1997).

In support of the motion Defendants have submitted an affidavit of Larry Valentia, the general manager of Holiday Mountain Fun Park, Inc., copies of the pleadings and Plaintiff’s deposition transcript. Plaintiff testified at his deposition that he attended the Appalachian Moto Jam with a friend. He stated that there were motocross events during the day and that a party was held afterwards at a bar and restaurant on the premises. He stated that alcoholic beverages were available at the bar and that he drank between five and six beers between 6:00 p.m. and his assault. He testified that after the bar closed people continued to socialize in the parking lot. He asserts that at approximately 1:00 a.m. he and his friend were talking to three intoxicated men who became aggressive. Plaintiff states that he did not move away from the men because he did not believe the situation would escalate. However, the men began bumping into him and his friend and one hit him multiple times in the face. After the incident, Plaintiff did not contact any authorities or the police. Instead, he went to sleep in his van. He asserts that when he woke up the next morning he realized the extent of his injuries and sought medical help at an EMS station located on the premises.

General Manager Valentia asserts in his affidavit that the Moto Jam event encompassed a flat track competition, a hill climb competition, a bike show, swap meet, live music and other events. Valentia asserts that the event has been held at Holiday Mountain three times per year since 2005. Approximately 100 to 250 people attend each event. Valentia states that participants and spectators were permitted to camp overnight on the property if they wanted to stay for both days of the two-day event. He claims that prior to Plaintiff’s assault, there had never been any type of criminal assault, altercation or reports of misbehavior during overnight camping at Moto Jam events. He states that the on-site restaurant and bar remained opened until approximately 1:00 a.m. when it closed because it was raining and there were no patrons. He asserts that there was an on-site EMT who stayed overnight on the premises in a trailer on the property. Valentia states there was no official sponsored party in the parking lot that evening and that the alleged assault occurred during an informal gathering. He claims that neither he nor any of the other individuals putting on the event had ever had any complaints about a dangerous condition or people acting improperly during the Moto Jam events. Based on the foregoing, Defendants assert that they are entitled to summary judgment as a matter of law because they may not be held liable for the criminal action of a third party in the absence of any notice regarding the likelihood of an assault.

For a plaintiff to prevail on a common law-negligence claim, he or she must first establish a legal duty owed by the defendant. D’Amico v. Christie, 71 NY3d 76 (1087). Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property. Id at 85. This includes 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.; Jayes v. Storms, 12 AD3d 1090 (4th Dept 2004). “To recover damages from an owner of real property for injuries caused by criminal acts on the premises, a plaintiff must produce evidence indicating that the owner knew or should have known of the probability of conduct on the part of third persons which was likely to endanger the safety of those lawfully on the premises.” Calle v. Elmhurst Woodside, LLC, 2020 WL 7761667 (2nd Dept 2020); Nallan v. Helmsley-Spear, Inc., 50 NY2d 507, 519 (1980).

To demonstrate their entitlement to judgment as a matter of law Defendants are required to demonstrate an absence of material fact on the issue of whether there was a likelihood of conduct on the part of a third person to endanger Plaintiff’s safety. See Maheshwari v. City of New York, 2 NY3d 288, 294 (2004). Assuming without deciding that Defendant’s papers have made this showing, Plaintiff’s submissions create an issue of fact. Defendants hosted a motocross event at which 100 to 250 people were in attendance. Both riders and spectators were permitted to camp in one of the parking lots. After the racing events ended for the day, a bar served alcohol to patrons until approximately 1:00 a.m. The parties’ deposition testimony demonstrates an awareness that campers would likely continue to congregate and consume alcohol in the parking lot after the bar closed. Deposition testimony further establishes that at prior events security was retained to monitor the parking lot. However, the unrefuted deposition testimony is that there was no formal security in place at the subject event. The promoter of the event and owner of Tops Production, LLC, Kenneth Buongiorno, testified that he believed the owner and operator of Holiday Mountain Action Sports, LLC, James Marvin, was responsible for monitoring the parking lot overnight. However, Marvin testified at his deposition that he had little, if anything, to do with the Moto Jam event. Marvin stated that he operated a flat motocross track on the premises pursuant to a lease with Holiday Mountain Ski & Fun, and that he stayed overnight in his camper solely for the purpose of getting up early the next morning to groom his racing track.

In adjudicating a motion for summary judgment, this court must draw all inferences in favor of the non-moving party. Even applying such standard, the court finds no legal basis to hold Defendants liable. There is no testimony or other evidence to support the conclusion that Defendants knew or should have known that Plaintiff would be spontaneously assaulted by a third party in the parking lot after the event. Wherefore, it is

ORDERED that Defendants’ motion for summary judgment is granted. The action is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: January 26, 2021
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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