At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of May, 2021.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

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JOHN ROMANO

Plaintiff,

- against- Index No. 518796/18

ALLSTAR SECURITY & CONSULTING, INC., AVANT GARDNER, LLC d/b/a THE BROOKLYN MIRAGE, STANTON P.I., Inc., DAVID VANDERHOFF and KEVIN MCLEAN,

Defendants.

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The following e-filed papers read herein:	NYCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	67-85, 113-126
Opposing Affidavits (Affirmations)	130-132, 134-136, 141-143
Reply Affidavits (Affirmations)	138-140, 148, 149-151, 153, 154

Upon the foregoing papers, defendant Avant Gardner, LLC d/b/a The Brooklyn Mirage (Avant Gardner) moves (Motion Sequence 3), for an order, pursuant to CPLR § 3212, granting it summary judgment, dismissing plaintiff's complaint and any cross claims against it, and dismissing co-defendant Stanton P.I. Inc.'s (Stanton) cross claims for contractual and common law indemnification.

Defendant Allstar Security & Consulting, Inc. (Allstar) moves (Motion Sequence 5) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing plaintiff's complaint and any cross claims in their entirety. In the alternative, Allstar moves for an order granting it conditional summary judgment against Avant Gardner on its cross claim for conditional contractual indemnification.

Plaintiff John Romano (Romano or plaintiff) brings this action against Allstar, Avant Gardner, Stanton, David Vanderhoff (Vanderhoff) and Kevin McLean (McLean) (collectively defendants) for personal injuries sustained on September 9, 2018 when he was a patron at Brooklyn Mirage, a nightclub owned and operated by Avant Gardner, located at 140 Stewart Avenue in Brooklyn.

Allstar contracted with Avant Gardner to provide security guard services at Brooklyn Mirage. The contract, which was effective at the time of the incident, stated that Allstar security guards were independent contractors employed by Allstar, but that Avant Gardner retained "final approval rights over selection of all guards" (Allstar contract ¶ 1). The contract provided that Allstar guards "shall, at all times, be subject to the direct supervision and control of Avant Gardner Management" (*id.* ¶ 3). Allstar was contractually required to maintain commercial general liability insurance for assault and battery and bodily injury, among other things. Allstar also agreed to defend and indemnify Avant Gardner and its employees from any claims, damages, liability and/or expense in connection with any claims arising at Brooklyn Mirage for any intentional acts or omissions arising out of the provision of security services under agreement or for acts or omissions committed by Allstar security guards (*id.* ¶ 5). The contract further provided that Allstar was not responsible to indemnify Avant Gardner as a result of acts, omissions, or negligence on the part of Avant Gardner, its officers or employees without any claimed acts, omissions, or negligence on the part of Allstar (*id.*). Likewise, Avant Gardner agreed to indemnify and defend Allstar and its employees for any personal injury as a result

of misconduct, acts or omissions committed by Avant Gardner, as well as the "provision of services by any other contractor, security or otherwise, retained by [Avant Gardner]" (*id.*). The contract also provided that Allstar was to be the only "security guard company" at the Brooklyn Mirage while they were on premises, and that if another company was on premises for a particular day, Allstar will not provide insurance (*id.*).

In a separate consulting agreement, also effective at the time of the incident, Stanton contracted with Avant Gardner to provide security consultant services at Brooklyn Mirage. The contracted for services included general administrative support and consulting regarding personnel and placement thereof at the venue (*see* Stanton agreement ¶ 1). Stanton and Avant Gardner agreed to indemnify and hold each other harmless with each other's respective employees against all claims, liabilities, damages, and expenses, including attorney's fees, arising in connection with the indemnifying party's negligent or intentionally wrongful act or omission (*id.* ¶ 7). The agreement further provided that security consultants were independent contractors and not Avant Gardner's employees (*id.* ¶ 9). Vanderhoff and McLean were both employed by Stanton on the date of the incident.

At the time of the incident, Avant Gardner had a written security plan, entitled "Venue – Site Security Master Plan" for Brooklyn Mirage, approved by the New York State Liquor Authority. The security plan required Avant Gardner to retain a "Security Director" who "will be a proprietary employee of the Venue with prior law enforcement management experience," and who "will oversee the security function as it pertains to all Venue operations to include a hybrid staffing consisting of proprietary security managers and a contract security guard force" (Security Plan at 12). According to the security plan, the Security Director was to be responsible for ensuring adequate security staffing for all venue events depending on the nature of the event, the size of the anticipated crowd, and the prior history of the events (*id.*). The security plan also provided that security personnel

would be assigned to posts and responsibilities both inside and outside of the venue and further, that security staff performance would be periodically monitored and assessed by an independent security consultant who reported to venue management (*id.*).

Plaintiff testified that on the night of the incident, he, and his friend Pasqual "Patsy" Vaccio (Patsy) met their friends Chris and Alyssa at Brooklyn Mirage. Plaintiff stated that he did not drink alcohol prior to his arrival at the venue, because he had taken his prescription Keppra[1] and Adderall[2] medication that day. Plaintiff testified that he consumed at least one alcoholic beverage before the incident occurred. At some point, because Alyssa was not feeling well, plaintiff and Patsy walked her over to the medical trailer and stood outside the trailer while Alyssa was inside. Plaintiff testified that a big security guard wearing all black and a hat, who appeared "Spanish," between 28-30 years old, came over to them and asked them to move because they were blocking the walkway. Plaintiff averred that he and Patsy agreed, informing the guard that they were trying to leave, and the guard stated that he would walk them out. Plaintiff indicated that there were two guards at the door near plaintiff. Plaintiff described the other guard as "dark, black maybe," wearing a black top, tan pants, no hat and had a radio. Plaintiff explained that as he and Patsy walked toward the exit, the security guards walked behind them. One of the guards and Patsy were joking around. While plaintiff did not hear exactly what was said because he was calling a car service, he heard the guard say, "you think you're a tough guy with all the muscles," and also heard the guard say something about Patsy's chain jewelry. Plaintiff stated that he also heard Patsy say something to the effect of "you'll never have one of these because you work here," which purportedly referred to Patsy's chain.

Plaintiff testified that he did not know exactly what happened from then, but as he exited the

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[1] An anti-seizure medication.

[2] A stimulant used to treat attention deficit hyperactivity disorder.

gate of the venue, he "got hit" by four or five people, that it was "like boom" and "did not stop." Plaintiff was allegedly "rocked over," had his head slammed into the street and his head held down. He testified that two men punched him and kicked him in the ribs. Patsy allegedly intervened and they got tackled by two other people and separated. Plaintiff testified that a short, stocky white male, who was approximately 50 years old and had blonde, curly hair "goes to let him up" and then "slams [him] back down and punched him several more times. The 50-year old male allegedly had something in his hand like brass knuckles. Another man, a large black man, allegedly ripped off plaintiff's chain. Plaintiff testified that there was a man physically on top of him when he was on the ground that looked like "Ghost from Power." Plaintiff did not recall if the Spanish or black male guard that walked him out attacked him. However, plaintiff testified that the Spanish guard initiated everything by making a radio call and by starting a verbal altercation with Patsy. Plaintiff also testified that there was another white male involved in the incident, who was approximately 60 years old and had a beard and a grey hat. Plaintiff was not sure whether this individual ever struck him. However, later on in the deposition, plaintiff clarified that it was the 60-year old man that threw him back to the ground after picking him up. While plaintiff's testimony regarding the two middle aged white males is confusing, in part, because those individual are unnamed, these individuals are apparently defendants Vanderhoff and McLean.

Plaintiff denied ever spitting at any of the individuals and denies throwing any punches. He also alleges that there never was any physical altercation between Patsy and any individual prior to the incident. The entire alleged incident occurred for approximately six minutes. Plaintiff testified that there were at least five security guards involved – two older white males, the Spanish male, the black "Ghost from Power," and another black individual who was about 35 years old wearing a black

top and tan pants who restrained him.

Arash Mansour (Mansour), an Allstar employee who was the Director of Security at Brooklyn Mirage, testified that the venue took up about two city blocks, had a one story indoor area and a large outdoor area. The indoor area was not open on the night of the incident because it was summertime. The venue is segregated from the outside street by barricades. According to Mansour, in September of 2018, there were typically 40-45 Allstar security guards working at Brooklyn Mirage events. Mansour testified that Allstar security guards were typically stationed in specific posts while Stanton security consultants were mobile, walking through the venue, spotting potential issues that were then raised with Mansour to be addressed. Mansour confirmed that Stanton employees perform consulting and provide advice concerning police matters, law, and rules at the venue.

Mansour testified that on the day of the incident, he received a radio call from the person in charge of EMTs requesting that security come immediately because two unruly male patrons (plaintiff and Patsy) kept barging into a medical trailer and making the medical staff and their patients uncomfortable. Anyone who was on the security channel, including Allstar and Stanton employees at the venue, would have heard the call. When Mansour responded to the medical trainer, Feng, the EMT worker/supervisor, identified the two males, and Mansour directed them to cease entering the medical trailer. Plaintiff and Patsy allegedly responded that they could go in if they wanted to, and asked Mansour, "who the fuck are you?" in a tone that Mansour did not appreciate. Mansour asked them to use a different tone, but plaintiff and Patsy allegedly continued cursing at him.

Mansour asked plaintiff and Patsy to leave, and walked with them toward the exit. Mansour testified that they kept repeating that they were "gangsters" and that they would come back and shoot

him in the face because they're gangsters and "that's how they roll." They also allegedly told Mansour that he was a "nobody working for $10 an hour." Mansour testified that as they got closer to the exit barricades, plaintiff allegedly turned to Mansour and spit in his face. In response, Mansour told plaintiff that this was a form of assault and that he could get plaintiff arrested. Mansour believes that McLean, who he believed to be approximately 60-70 years old, was standing behind him when this happened.

Mansour testified that once he and the two men passed the exit barricades, plaintiff allegedly swung at him. Mansour believed that plaintiff was intoxicated because his jaw was moving side to side as if he had no control over it, his breath smelled of alcohol, his slurred his speech and his eyes were red. Mansour blocked plaintiff's swing. Vanderhoff, who was in the vicinity when Mansour and the men were walking out, was present in the outside area past the barricade, allegedly grabbed plaintiff from behind and tripped him to the floor where security held him allegedly to calm him down. At that point, plaintiff was on his back with both Mansour and Vanderhoff were standing over plaintiff asking him to calm down, and Mansour's hand on his chest. After plaintiff promised to calm down, Mansour and Vanderhoff helped plaintiff to his feet. However, plaintiff allegedly did not remain calm, started "mouthing off" again, stated that he was a gangster and threatened to kill them. At that point, Mansour determined that since they were outside, "it was no longer worth entertaining," and they all began walking back toward the other side of the barricade. Mansour then heard a scream, turned around and saw Vanderhoff on the floor "tussling" with plaintiff on the roadway. Mansour also saw Patsy kick Vanderhoff as he was engaged with plaintiff. Thereafter, Mansour and two or three other guards rushed toward Patsy to prevent him from harming Vanderhoff. Mansour did not recall the identities of the other guards but recalls that McLean was

present. Mansour denies observing any Allstar employee throw a punch at plaintiff.

Mansour testified that he believed that there were three or four Stanton consultants at the venue at the time of the incident. Mansour also opined that the number of security guards present at the venue that night was not an issue with respect the number of guards needed to quell the incident.

After the incident, Mansour prepared a written incident report for Allstar. In essence, the incident report aligns with Mansour's testimony. The report clarifies that it was McLean who reported to assist Mansour outside the medical tent and escorted plaintiff and Patsy out of the venue along with Mansour. The report also states that after plaintiff was initially subdued and agreed to leave, plaintiff eventually rushed toward Vanderhoff, who happened to be closest to him, as Mansour and the other guards were walking away. The report notes that by the time Mansour turned around, Vanderhoff had attempted to restrain plaintiff, and that Mansour and McLean surrounded Patsy to protect Vanderhoff because Patsy had been kicking him. Once plaintiff calmed down, Mansour and the guards got plaintiff to his feet and both plaintiff and Patsy walked away.

Vanderhoff, who was 62 years old when he testified in July of 2020, testified that the night of the incident was slightly busier than usual. Vanderhoff was told by Mike Swain (Swain), Stanton's operational manager who was also at Brooklyn Mirage that night, to "roam" the venue. When Vanderhoff roamed, he spent about 70% of his time within the confines of the venue and 30% outside the venue to make sure that everything was clear. Vanderhoff testified that he helped bring someone to the EMT station on the night of the incident. He heard screaming and yelling and noticed Mansour, along with two or three Allstar security guards, escorting two patrons out. He remembered one of the Allstar guards being Dimitrius, an African American male. The two men were screaming and threatening, and Vanderhoff heard plaintiff say something about a gun and

coming back to venue to shoot up the place, which grabbed his attention. As plaintiff and Patsy continued to argue while being walked out, Vanderhoff tried to take advantage of his age and talk them out of escalating the situation, and even waved at the guards to walk off in an effort to defuse the situation. Mansour and the Allstar staff backed off a little, and Patsy told plaintiff to leave and began to walk away. At that point, Allstar staff, including Dimitrius, were starting to walk away. Vanderhoff testified that he was about five or six feet away and was about to walk away when plaintiff unexpectedly turned, spit in his face, and grabbed on to his shoulders. At that point, they were past the gate and a few feet from the sidewalk. Plaintiff and Vanderhoff then began struggling on the ground, and Patsy either kicked or kneed him in the back of the head. Patsy was then pushed away from Vanderhoff by Demetrius, an Allstar security guard. Vanderhoff denied kicking or punching plaintiff, and testified that plaintiff was "hyped up" and out of control. Vanderhoff testified that he was defending himself against plaintiff because he was afraid that plaintiff would get on top of him and could hurt him because plaintiff was half his age.

Vanderhoff testified that after he and plaintiff both tired out, security guards came back to yell at everyone to stop, and Vanderhoff even tried to help plaintiff up off the ground. Vanderhoff testified that the security guards did not try to physically break up the fight, although Vanderhoff wished that they had done so to end the incident. He also testified that McLean did not touch anyone during the altercation. Vanderhoff denied throwing punches, kicks, or strikes, but testified that his elbow might have inadvertently struck plaintiff.

Vanderhoff testified that there was an ongoing issue at the venue about lack of security staff, and that he mentioned this several times to Mansour and Swain. On several occasions, Vanderhoff helped out at the venue beyond his job as security consultant, for example, filling in as security when

a security guard took a break or used the bathroom. However, Vanderhoff stated that fill-ins were not regular, and that he never overtook Allstar's security duties.

McLean, a 68-year old[3] security consultant and safety director for Stanton, testified that security staffing at Brooklyn Mirage was sometimes low and sometimes high, but did not recall what the level of staffing was on the night in question. McLean testified that staffing levels were determined by Craig Jacobson (Jacobson), Avant Gardner's director of operations. McLean never told Jacobson that security staffing levels were low because it was Swain's position to do so and, like Vanderhoff, McLean also sometimes stepped in to help Allstar when they needed support with crowd control or temporarily covering a post.

McLean testified that on the night of the incident, he roamed the venue. He first became aware of the incident over the radio. McLean observed Vanderhoff attempting to restrain another individual while on the ground, in the smoking section of the street, but never saw any punching or hitting. McLean told them to relax and take it easy, and after that, they got up.

Jacobson testified that he handled day-to-day operation for events, setup and preliminary planning for events at Brooklyn Mirage, and that he was present for all shows. Jacobson testified that Avant Gardner did not employ any in-house security staff. However, Jacobson testified that at one point, Avant Gardner was required to have, and had, one in-house security director, "Darryl," who was employed with them for a year, but did not recall whether Darryl was employed on the night of the incident. When Darryl left, Mansour took on most of his responsibilities. The security director would help Avant Gardner make sure that all the security guards were present and in their correct position, ensure that they are customer-friendly and nonviolent, and make sure that no underage minors were admitted to the venue.

[3] At the time of his deposition.

Jacobson affirmed that Stanton employees were not guards but security consultants who were responsible for big picture issues such as police and fire compliance, as well as monitoring Allstar security guards and coordinating with their supervisor. On occasion, NYPD officers have been assigned to work outside the venue, and Jacobsen testified to Avant Gardner's high-level relationship with the police precinct. Stanton would typically have three to four consultants present during events. Jacobson testified that for any given event, he, Mansour, and Swain decided the appropriate security staffing levels in consultation with each other. There have been instances where Jacobson has expressed concern over low budget for security to Avant Gardner's chief financial officer, and times that Mansour raised this concern with him. Jacobson believed there were approximately 62 security guards working on the night of the incident, but did not know the number of patrons attending the event that night.

Jacobson recalled that the incident began inside the venue but ended up outside on a public street which he considered to be the fence line of the venue, but he did not personally observe the incident. Jacobson also testified that he reviewed security footage of the incident taken inside the venue that depicted at least a portion of the incident. He did not recall what happened to the footage, but recalled observing a customer spitting toward the security team. He also observed two customers being escorted out. He did not recall observing a physical altercation on the video. Based on the video, Jacobson believed that the number of security personnel who responded to the incident was sufficient.

William Stanton (William), Stanton's owner, testified on its behalf. Stanton believed that the event on the night in question was understaffed by Allstar. In subsequent conversations with Swain, Swain expressed frustration to William that Allstar was not allotted enough security staffing and

supervisors due to Avant Gardner's budgetary constraints. William's understanding was that Jacobson, Mansour and Swain would collectively request a number of staff, and then later, Jacobson would articulate that Avant Gardner would only pay for a limited number of staff, which sometimes depended on how much the individuals or entities who contracted the venue out would pay.

The parties have provided the court with two videos – an eight second video and a 42 second video – both of which appear to be videos testified about by witnesses at their deposition. In the shorter video, an older white male, apparently Vanderhoff, appears to be rolling around and "tussling" in the street with plaintiff. While it appears as though Vanderhoff struck plaintiff with his right hand while Vanderhoff was over him, Vanderhoff denied that he struck or attempted to strike plaintiff, and testified that he was trying to get his hand on the ground in order to avoid plaintiff flipping him over. There was another older white male present in the video, as well as Dimitrius, identified by Vanderhoff at his deposition. The longer video depicts plaintiff in the same approximate area on the ground, with plaintiff lying on the ground and Vanderhoff, Dimitrius and two other individuals standing over the plaintiff and trying to get plaintiff to get up. At one point in the video, plaintiff moves to get up and it appears as though Vanderhoff pushes or moves plaintiff back down. Plaintiff eventually gets up. Both videos have audio but other than several audible obscenities in the videos and hearing the men over plaintiff tell him to get up, the audio is mostly incomprehensible.

The amended complaint alleges that plaintiff, who was lawfully on the premises, was caused to be injured when he was struck, beaten, battered and/or assaulted by Vanderhoff and McLean due to the negligence of defendants, their servants, agents and/or employees. The amended complaint further alleges that defendants, their servants, agents and/or employees were negligent and reckless in

their ownership, operation, maintenance and control of the premises; in failing to hire and train personnel, failing to supervise employees, and causing or permitting to be caused a dangerous condition, causing plaintiff to be assaulted.

Avant Gardner's Motion

Avant Gardner contends that it is not liable to plaintiff because plaintiff was injured by intentional or negligent acts of security guards or security consultants employed at Brooklyn Mirage who were independent contractors, not Avant Gardner employees, and that by law, they are not liable for an independent contractor's negligence. In that regard, Avant Gardner notes that the contracts between it and both Allstar and Stanton (individually), expressly states that Allstar and Stanton employees are independent contractors. Avant Gardner also points out that Mansour, as well as Vanderhoff and McLean, testified that they were employed by Allstar and Stanton, respectively, rather than by Avant Gardner, and that there are no questions of fact regarding this issue. In advancing this argument, Avant Gardner does not concede that plaintiff has any actionable claim against any of the defendants, as the evidence establishes that the incident was initiated by the plaintiff and Pasty, rather than by any of the defendants.

To the extent that plaintiff's theory of liability, as stated in the bill of particulars, is that Avant Gardner was negligent in the ownership and maintenance of the premises, in failure to supervise personnel, and in negligent hiring, Avant Gardner contends that the claims in this action do not involve the condition or maintenance of the premises, that there is no delegable duty that is owed to the plaintiff, and that there is no proof or claim that Avant Gardner failed to maintain the premises in a reasonably safe condition. Avant Gardner contends that even if it did retain a limited power to supervise Allstar and Stanton, that limited power is insufficient to make it liable for any alleged

negligence of Allstar or Stanton employees.

Avant Gardner argues that the alleged assault occurred outside of Brooklyn Mirage premises, and therefore, there can be no claim that the nondelegable duties to keep the premises safe was violated, since the assault had nothing to do with Avant Gardner's maintenance of the premises or its condition. Avant Gardner also contends that the facts of the case are distinguishable from those where security companies hired to perform duties result in vicarious liability for the employer, since those cases involve condition of the premises and not the means or methods of the work performed by the independent contractor.

Avant Gardner further argues that there is no proof that it was negligent hiring or supervising either Allstar or Stanton, or that either of these companies were incompetent. There was no evidence that any individuals involved in the altercation had the propensity to participate in such altercations or were prone to violence. Avant Gardner claims that it had the right to rely on the qualifications of the independent contractors and cannot be held to anticipate their alleged misconduct.

In opposition, plaintiff contends that there are questions of fact that preclude granting summary judgment in favor of Avant Gardner. Specifically, plaintiff argues that there are questions of fact as to whether the work that Avant Gardner retained the independent contractors to perform was inherently dangerous and whether Avant Gardner was aware of those special dangers. Plaintiff notes that Stanton, Vanderhoff, McLean and Mansour testified that Stanton and Allstar would meet prior to events to determine adequate event security staffing levels, and that such decisions were made by Jacobson on behalf of Avant Gardner. Plaintiff also points to Vanderhoff and McLean's opinion that events at Brooklyn Mirage were sometimes understaffed due to budget constraints. Plaintiff contends that the fact that Jacobson testified that some events required NYPD presence

outside of the venue raised issues of fact as to whether Avant Gardner had reason to know of the special dangers inherent in the work. Further, plaintiff contends that the fact that Vanderhoff testified that his job was not to perform as a security guard but also that he was involved in a tussle with plaintiff while escorting him from the premises when other security guards did not do anything to break up the fight and even walked away raises a question of fact as to the adequacy of staffing levels for the event. In addition, plaintiff argues that the fact that there was only one Allstar individual, Mansour, escorting plaintiff out of the venue raises a question of fact about the adequate staffing levels.

Plaintiff also argues that Avant Gardner is liable for the negligent acts of its contractors because it assumed a specific duty by contract in that it had final approval over selection of all security guards. Plaintiff notes that the contract further directed that security guards shall at all times be subject to direct supervision and control of Avant Gardner management. Plaintiff also points to Avant Gardner's Event Venue Site Security Master Plan to support this assertion. The security plan required Avant Gardner to retain a proprietary security director to oversee the security function, determine adequate staffing levels, oversee security staff hiring and training. Plaintiff contends that this was required by the State Liquor Authority, and that in this way, Avant Gardner retained control over security guard personnel and retained liability.

Plaintiff next contends that Avant Gardner had a nondelegable duty to keep the premises safe, including a safe means of ingress and egress, and is therefore liable for the negligence of its independent contractors. Plaintiff notes that Avant Gardner's claim that the events occurred outside its premises and that they are therefore not liable is false, since there was testimony that the events occurred in the smoking area outside the premises in the dead end street, near the fence line of the

venue, and because there is no question that the incident began inside the venue by the bathroom and medical area.

Plaintiff also argues that Avant Gardner failed to establish Allstar entirely displaced its duty to maintain the premises safely under *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), as Avant Gardner contractually retained the ability to select, supervise and control Allstar security staff. Plaintiff further contends that there was sufficient opportunity to prevent or control the incident, and that, contrary to Avant Gardner's assertion, it was not spontaneous. In that regard, plaintiff argues that the incident lasted six minutes, and that at one point, Mansour and other security personnel walked away, thinking the incident was over, before the incident was concluded. Plaintiff contends that security guards did not do anything to break up the fight between plaintiff and Vanderhoff, and did not prevent the incident from escalating or take other steps to control the situation. Plaintiff argues that even the videos submitted of the incident demonstrate that plaintiff was repeatedly punched with several security guards standing around and not doing anything, and even shows plaintiff being thrown to the ground after being helped up. Finally, plaintiff points to Vanderhoff's testimony that he would have liked someone to grab plaintiff's legs and arms and pin him down so that he can end it.

In reply, Avant Gardner contends that none of the exceptions relied upon by plaintiff apply to impose liability on independent contractors. In that regard, Avant Gardner argues that plaintiff has not proven that it was negligent in selecting, instructing, or supervising the independent contractor, or established that the work was inherently dangerous or that Avant Gardner has a specific nondelegable duty. It further contends that the work of a security guard company or consultant does not create a dangerous condition in and of itself. Moreover, it argues that it is not bound to anticipate the

misconduct of its independent contractor and here, there is no evidence that Avant Gardner hired incompetent contractors or failed to exercise reasonable care in screening the companies they contracted with or their employees.

Avant Gardner further replies that the contract between it and Allstar does not support plaintiff's claim that it assumed a specific duty. While Avant Gardner concedes that it can participate in hiring, it notes that Jacobson testified that late employees or those who do not appear for work are terminated by Allstar, not it. Avant Gardner further argues that the security plan does not constitute an exception to the rule that an employer is not liable to the negligent act of its independent contractors. Avant Gardner claims that the number of security guards who would have escorted plaintiff outside would not have changed the outcome of events, as Vanderhoff testified that he was acting in self-defense after being spit upon and assaulted. Avant Gardner further claims that it did not breach any nondelegable duty to plaintiff. Plaintiff's reliance of *Espinal* should be dismissed since those cases involve tort liability to third parties where the contracting party has entirely displaced the other party's duty to maintain the premises safely, which is factually and legally allegedly contradicted here. Avant Gardner states that plaintiff's argument that had the opportunity to control the attack is without merit.

In limited opposition to Avant Gardner's motion, Allstar initially contends that there is no question of fact as to any act or omission constituting negligence on the part of Allstar or Avant Gardner. However, Allstar argues that if the court determines that Allstar is not entitled to summary judgment, then Avant Gardner's motion must likewise be denied. Allstar further contends that Avant Gardner's motion must be "potentially denied" to the extent the court agrees that there are questions of fact as to adequacy of staffing levels or whether Allstar intervened between plaintiff and

Vanderhoff timely and sufficiently, because Avant Gardner, not Allstar, determined staffing levels for the night of the incident. Allstar argues that the evidence establishes that no Allstar employee was involved in the incident, and that plaintiff was the initial aggressor.

Allstar argues that the court cannot grant Avant Gardner motion to dismiss Allstar's cross claim against Avant Gardner unless Allstar is also dismissed, because Allstar is entitled to conditional contractual indemnification from Avant Gardner for any liability found against Stanton, Vanderhoff and McLean. To that end, under the contract, Avant Gardner is contractually obligated to indemnify Allstar for any liability assessed by Stanton, Vanderhoff or McLean. Allstar claims that it is undisputed that Vanderhoff, a Stanton employee, was involved in the interaction with plaintiff and that plaintiff's injuries were caused by Vanderhoff, and therefore, based on the contractual agreement, Allstar is entitled to indemnification. Allstar argues that indemnification is mandated whether or not Avant Gardner is ultimately found free of fault. Allstar alleges that courts have routinely granted conditional indemnification when a finding of liability against one defendant would only be by operational of law, and here, Allstar does not seek indemnification for its own negligence, but for any negligence against Stanton, Vanderhoff and McLean to prevent Allstar from having to pay above its proportional share of liability.

Allstar's Motion

Allstar claims that it is entitled to summary judgment against plaintiff because there is no evidence that Allstar or its employees were involved in the altercation between Vanderhoff and plaintiff or that any Allstar employees made physical contact with plaintiff. In that regard, Mansour testified that neither he nor any other Allstar employee was involved, which Vanderhoff confirmed. While plaintiff speculates that Demetrius, an African American Allstar employee, was physically

involved, Vanderhoff testified that Demetrius was at least 20 feet away dealing with plaintiff's friend. Allstar contends that there is no theory to extend liability to Allstar for Stanton or its employees' actions. Allstar also contends that there is no evidence that it controlled the staffing levels used by the venue, and Allstar claims that it was happy to provide as many security guards as were needed. Allstar argues that it cannot be bound for Vanderhoff's actions, who, in any event, was acting in self-defense. Alternatively, Allstar contends that it is entitled to contractual indemnification from Avant Gardner for any liability assessed against Stanton, Vanderhoff and McLean. Plaintiff takes no position on Allstar's motion against Avant Gardner for contractual indemnification.

In opposition, plaintiff argues that there are factual issues as to whether plaintiff was assaulted by Allstar. To that end, plaintiff notes that Jacobson testified that he believed that Mansour made contact with plaintiff when he, as well as Vanderhoff, pinned him down. Plaintiff also points to Mansour's testimony that he had his hand on plaintiff's chest while plaintiff was on the ground, and points to the video, which purportedly shows that Allstar personnel were present.

Plaintiff further contends that there is evidence that Allstar was negligent in performing its obligations under the contract, in that they failed to protect plaintiff or do anything else to break up the alleged assault. In addition, while Allstar's witness testified that there were approximately 45 security guards, Avant Gardner's witness testified that 62 were hired, which raises a question of fact as to whether there were enough guards to prevent the altercation or whether Allstar was negligent in failing to provide plaintiff with adequate security. Plaintiff also alleges that there is a question of fact as to whether the Allstar guards had the opportunity to prevent or control the situation, given testimony that it occurred for six minutes.

Avant Gardner opposes the branch of the motion that seeks an order granting Allstar

conditional contractual indemnification from Avant Gardner. Avant Gardner contends that there has not been a finding that Allstar is free from negligence, and therefore, Allstar's request for conditional contractual indemnification is premature. In addition, Avant Gardner argues that questions of fact exist as to whether the indemnification provision in the agreement between Avant Gardner and Allstar applies to the facts of this case. In that regard, Avant Gardner submits that Allstar does not claim that Avant Gardner was negligent or committed any acts or omissions as to the assault. Avant Gardner contends that Allstar relies on the portion of the contract that states that Allstar shall be the only security guard company on the premises. However, Avant Gardner notes that Stanton was not a security guard company but rather was hired solely to be in the role of security consultants, and did not provide security guards for the venue.

Avant Gardner further contends that Stanton employees' actions were unforeseen and not contemplated by the indemnification language in the contract. By its terms, the indemnification agreement is triggered if another security company is employed by Avant Gardner and acts in a security capacity, which is not the case here.

In its reply, Allstar contends that neither it nor Avant Gardner was negligent in any way. However, if Allstar is not dismissed, Avant Gardner reiterates that it cannot be dismissed either. Allstar further claims that Stanton employees, while hired as security consultants, were acting as de facto security guards. Allstar argues that it is undisputed that plaintiff's physical injuries were caused by Vanderhoff punching him, and therefore, under these circumstances, Allstar is entitled to conditional contractual indemnification against Avant Gardner.

In reply and support of its partial opposition to Allstar's motion, Avant Gardner contends that regardless of whether Allstar's motion for summary judgment is granted, the cross claim by Allstar

for contractual indemnification must be dismissed. Avant Gardner claims that the incident was sudden and unpredictable and could not have been prevented, even with increased security staff.

In reply to plaintiff's opposition, Allstar contends that the evidence demonstrates that plaintiff instigated the incident and that Vanderhoff was acting in self-defense, and that incident was spontaneous and could not be prevented. According to Allstar, the video demonstrates that Allstar employees clearly intervened, while Vanderhoff appears to spontaneously put plaintiff back on the ground. Allstar contends that testimony that a black Allstar security guard injured him is unsupported and speculative, as the remainder of the parties testified that the only black security guard from Allstar, Demetrius, was at least 20 feet away during the entire altercation.

Discussion

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the

light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Regarding Avant Gardner's liability, it is a well settled rule that a party who retains an independent contractor is not liable for the independent contractor's negligence, because it has no right to supervise or control the work (*see Brothers v New York State Elec. and Gas Corp.*, 11 NY3d 251, 257-258 [2008]; *Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]; *Backiel v Citibank*, 299 AD2d 504, 505 [2d Dept 2002]; *Zedda v Albert*, 233 AD2d 497, 498 [2d Dept 1996]; *Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568, 569 [1st Dept 2010]). Exceptions to this general rule are: (1) when the employer is negligent in selecting, instructing or supervising the contractor; (2) when the employer has a nondelegable duty arising out of some relation to the public or a particular plaintiff; (3) when the contracted-for work is specially, peculiarly or inherently dangerous; or (4) where the employer has a statutory duty to control the work (*see Brothers*, 11 NY3d at 258; *Nelson*, 129 AD3d at 569).

Control of the method and means of work to be performed is a critical factor in determining

whether a party is an independent contractor for the purposes of tort liability (*see Weinfeld v HR Photography, Inc.*, 149 AD3d 1014, 1014-1015 [2d Dept 2017]; *Goodwin v Comcast Corp.*, 42 AD3d 322, 322 [1st Dept 2007]). "Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*Weinfeld*, 149 AD3d at 1015, *quoting Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). The "mere retention of general supervisory powers over the acts of the independent contractor will not impose liability" (*Wright v Esplanade Gardens*, 150 AD2d 197, 198 [1st Dept 1989]; *see also Leeds v D.B.D. Servs.*, 309 AD2d 666, 667 [1st Dept 2003]; *Santella v Andrews*, 266 AD2d 62, 63 [1st Dept 1999]). Exercise of merely incidental control over an independent contractor's work does not turn that independent contractor into an employee (*see Chuchuca v Chuchuca*, 67 AD3d 948, 950 [2d Dept 2009]). "However, if the employer assumes control of the details of the work or some part of it, then the general rule will not apply and the employer may himself be liable" (*Wright*, 150 AD2d a 198).

A nondelegable duty is one that an employer is not free to delegate to a contractor and requires the person upon whom it is imposed to answer for it that care is imposed by anyone and largely turns on policy considerations (*see Brothers*, 11 NY3d at 259). An owner of premises open to the public has a nondelegable duty to keep the premises safe and provide a safe means of ingress and egress (*see Etminan v Esposito*, 126 AD3d 854, 855 [2d Dept 2015]; *Backiel*, 299 AD2d at 505; *Grizzell v JQ Assoc., LLC*, 110 AD3d 762, 764 [2d Dept 2013]; *Giacometti v Farrell*, 133 AD3d 1387, 1390 [4th Dept 2015]). While such determinations as to control of work and whether the work is inherently dangerous typically involve questions of fact (*see Rosenberg v Equitable Life Assur. Socy. Of U.S.*, 79 NY2d 663, 670 [1992]; *Luksik v 27 Prospect Park W. Tenants Corp.*, 19 AD3d

557, 557 [2d Dept 2005]), where the evidence on the issue of control does not present a conflict, the matter can be determined as a matter of law (*id.* at 323. *Zedda*, 233 AD2d at 498; *Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007, 1009 [2d Dept 2011]).

In the instant matter, while Avant Gardner has met its burden of establishing that the Allstar security guards and Stanton security consultants were independent contractors, it has failed to meet its burden of establishing that none of the exceptions to the general rule that an employer is not liable for tortious actions of its independent contractors apply. In that regard, there are issues of fact in the record as to the level of control that Avant Gardner retained over Allstar guards and Stanton consultants. In its contract with Allstar, Avant Gardner retained final approval over selection of Allstar guards. By contract, Allstar guards were also at all times subject to direct supervision and control by Avant Gardner. The Avant Gardner security plan, effective at the time of the incident, confirms Avant Gardner's control over the guards by way of a proprietary Security Director whose responsibility it was to oversee all staff, make sure staff was in their posts, and ensure adequate staffing levels for events. Jacobson testified that he did not recall whether Darryl, Avant Gardner's one time Security Director, was onsite on the night of the incident. Jacobson did, however, testify that he was present that evening, and that his responsibilities included management and supervision, as well as determining adequate staffing levels for events. Under these circumstances, there are questions of fact as to the level of control exerted by Avant Gardner of Allstar and Stanton that preclude granting summary judgment in Avant Gardner's favor. Likewise, on this record, there are issues of fact as to whether Allstar entirely displaced Avant Gardner's duty to maintain the premises safely (*see Espinal*, 98 NY2d 136; *Giacometti v Farrell*, 133 AD3d 1387, 1390-1391 [4th Dept 2015]).

In addition, there are factual issues as to whether Avant Gardner breached their nondelegable duty to provide the public with a reasonably safe premises and a safe way of ingress and egress as plaintiff was being walked out of the venue. There is also a question of fact as to exactly how many security guards and consultants were present on the night of the incident, and whether staffing levels were adequate given the number of security guards who responded to the incident and the fact that they walked away from the altercation at some point, possibly to return to their posts. The evidence demonstrates that plaintiff and his friend Patsy were being escorted out of the venue by Allstar and Stanton staff, and that the altercation began inside the venue near the medical area but ended outside the venue on the street, but still in an area where venue security staff were to patrol. Vanderhoff and McLean testified that while it was not their job to do so, they would fill in for Allstar security guards while the guards took breaks. Multiple witnesses also testified about their concerns that the venue did not provide adequate security staffing at times. Jacobson testified that he, with input from Mansour and Stanton, determined staffing levels, which sometimes depended on how much revenue an event was expected to raise and how much the producers of an event would pay. This testimony raises questions for the trier of fact to resolve as to adequacy of staffing levels and Avant Gardner's duty to provide a safe means of egress and ingress to the public.

Furthermore, related to the issue of whether there was adequate security staff present at the facility, there are factual questions as to whether Avant Gardner had the opportunity to control or prevent the incident, which Avant Gardner contends spontaneously occurred. "Although a property owner must act in a reasonable manner to prevent harm to those on its premises, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control" (*Giambruno v Crazy Donkey Bar &*

Grill, 65 AD3d 1190, 1192 [2d Dept 2009]; *see also D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *Ali v Miller's Ale House*, 189 AD3d 966, 967 [2d Dept 2020]). "[T]he owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults" (*Giambruno*, 65 AD3d at 1192; *Garda v Paramaount Theatre, LLC*, 2021 NY Slip Op 02278 [2d Dept 2021]; *Katekis v Naut, Inc.*, 60 AD3d 817 [2d Dept 2009]).

Here, there is a question of fact as to how long the alleged assault on plaintiff occurred and whether security staff or Avant Gardner staff had an opportunity to intervene to stop the alleged assault and prevent plaintiff from being harmed. While Vanderhoff testified that the incident took place over "seconds," plaintiff testified that the events occurred over a span of six minutes. The two videos submitted to the court, which depict only a portion of the altercation that occurred on the street, together are almost one minute in duration. The videos depict plaintiff and Vanderhoff "tussling" at one point, with several security staff surrounding them. Vanderhoff also testified that he wished that security staff would intervene to stop the altercation between him and plaintiff and end it, but that instead, security staff walked away at one point. Based on testimony about the relative length of the altercation with plaintiff, both inside and outside of the venue, the videos, and Vanderhoff's and plaintiff's testimony, there are factual questions as to whether the incident could have been cut short or prevented entirely if security guards had intervened. There are also questions as to whether the guards did not intervene and moved to leave in order to return to their posts, and whether retention of additional security staff for the event so that all posts would be manned and there would be a greater number of security staff to assist plaintiff would have prevented plaintiff's injuries. The factual issues preclude granting Avant Gardner summary judgment.

While plaintiff argues that Avant Gardner may be held liable for the negligent hiring,

retention or supervision of security staff under certain circumstances (*see Chichester v Wallace*, 150 AD3d 1073, 1074-1075 [2d Dept 2017]), the record is silent as to whether Avant Gardner had any knowledge of any Allstar or Stanton employee's propensity for violence with respect to the conduct that caused plaintiff's injury (*see Hoffman v Verizon Wireless, Inc.*, 125 AD3d 806, 807 [2d Dept 2015] *citing Jackson v New York University Downtown Hospital*, 69 AD3d 801, 801 [2d Dept 2010]).

Accordingly, having failed to meet its prima facie burden, Avant Gardner's motion for summary judgment dismissing plaintiff's claims and all cross claims against it is denied in its entirety without regard to the sufficiency of the opposing papers (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014] [internal quotations omitted]); *Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 934-935 [2d Dept 2015]; *Baillargeon, Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]).

Allstar has failed to meet its burden of demonstrating that it is not liable for plaintiff's injuries. "Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *see also Holmes v Gary Goldberg & Co., Inc.*, 40 AD3d 1033, 1034 [2d Dept 2007]).

Here, several witnesses testified that plaintiff was being walked out of the venue by Mansour, an Allstar employee, as well as several other individuals, one of whom was possibly Demetrius, another Allstar employee. Mansour testified that at one point during the incident while plaintiff was on the ground, that he (Mansour) put his hand on plaintiff's chest. Plaintiff testified that two men, who he did not identify, kicked, and punched him in his ribs, that a black man ripped off his chain,

and that he did not know whether Mansour attacked him. Plaintiff also speculates that Dimitrius was physically involved in the altercation. The videos submitted by the parties show plaintiff on the ground with Vanderhoff as well as Dimitrius and other Allstar and/or Stanton security staff nearby. Further, plaintiff denied instigating the incident or assaulting any security guards and claims that he was defending himself. Given these particular facts as well as the record as a whole as detailed above, Allstar has not established that it is free from fault. Additionally, on this record, questions of fact exist as to whether Vanderhoff and security staff were defending themselves when they brought plaintiff to the ground and restrained him.

There are also questions of fact as to whether Allstar security guards failed to adequately prevent the alleged assault on plaintiff. In that regard, Vanderhoff testified that Allstar security guards were present during the altercation but did not intervene to end it. Questions exist as to whether intervention by Allstar guards earlier during what plaintiff claims was a six-minute incident would have prevented plaintiff's injuries. Thus, that branch of Allstar's motion for summary judgment dismissing all claims and cross claims against it is likewise denied.

Based on this record, Allstar is not entitled to conditional contractual indemnification. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], *quoting Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *Baillargeon*, 91 AD3d at 688. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Baillargeon*, 91 AD3d at 688; *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept

2009]). "Where a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as premature" (*Baillargeon*, 91 AD3d at 688; *Bellefleur v Newark Beth Israel Medical Center*, 66 AD3d 807, 808-809 [2d Dept 2009]).

Here, since Allstar failed to eliminate all triable issues as to its negligence in causing plaintiff's injuries, it failed to meet its prima facie burden, and its claims for conditional contractual indemnification must be denied regardless of the sufficiency of the opposing papers (*Voss v Netherlands Ins. Co.*, 22 NY3d at, 734; *Bleich,* 132 AD3d at 934-935; *Baillargeon*, 91 AD3d at, 688).

Based upon the foregoing, Avant Gardner's and Allstar's motions (Motion Sequences 3 and 5) are denied in their entirety.

The court has reviewed the parties' remaining contentions and finds them to be without merit.

This constitutes the decision and order of the court.

ENTER,

HON. INGRID JOSEPH, J. S. C.

Hon. Ingrid Joseph
Supreme Court Justice

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Kings County Clerk's Office
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