Memeh v Spa 88 LLC
2023 NY Slip Op 30476(U)
February 15, 2023
Supreme Court, New York County
Docket Number: Index No. 158887/2019
Judge: Lori S. Sattler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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CHINYERE MEMEH,

Plaintiff,

- v -

SPA 88 LLC,

Defendant.

INDEX NO. 158887/2019

MOTION DATE 11/02/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY.

In this tort action, Defendant Spa 88 LLC ("Defendant") moves for summary judgment against plaintiff Chinyere Memeh ("Plaintiff") dismissing the Complaint in its entirety. Plaintiff opposes the motion.

This action arises out of an alleged sexual assault of Plaintiff on October 22, 2018, at the spa/restaurant owned and operated by Defendant. Plaintiff alleges that, while a guest in the spa's steam room, she was sexually assaulted during a massage given by a man dressed in clothing similar to that worn by Defendant's employees (NYSCEF Doc. No 65, Plaintiff EBT at 44). She maintains that he subsequently assaulted a friend who had accompanied her (*id*. at 44). Plaintiff testified that she reported the assault to the front desk and asked for the police to be called (*id.* at 50-51). Thereafter, a man whom she identifies as an employee came from an office behind the front desk and ran to the steam room where he and the alleged perpetrator had a physical altercation (*id*. at 51-55). It was at that time that Plaintiff learned that the alleged perpetrator was

not Defendant's employee (*id.*). Ultimately, the police were called, and the alleged perpetrator was arrested.

Although it is undisputed that at least one physical altercation occurred on the evening in question, Defendant advances a dramatically different account of a fight at the premises than Plaintiff. Defendant's manager, Dimitry Lerner ("Lerner"), did not testify that a fight between a spa employee and Plaintiff's alleged assailant occurred after the alleged sexual assault of Plaintiff. Rather, he testified that a fight between a lone guest and a group of patrons that included the alleged assailant occurred around 7 p.m., prior to when Plaintiff reported her assault to the front desk. Both the individual and group had been drinking (NYSCEF Doc. No. 66, Lerner EBT at 52-53). He states that he stopped the fight and talked to the lone guest, who left the premises shortly thereafter after "cooling off" in Lerner's office (*id.* at 105). Lerner maintains that he did not see Plaintiff at the time he stopped this fight (*id*. at 83). He recalled that the alleged assailant later told him that he initially thought he had been arrested because of the fight (*id*. at 91). Lerner, despite knowing that group of men were drinking, permitted them to stay on the premises and did not check in with them at any point after the fight (*id*. at 83, 89). They remained for four additional hours and left the premises at 11 p.m. Lerner was unsure whether they continued to drink. He testified:

> Q: Did they continue to drink?
> A: No.
> Q: And did you cut them off from drinking?
> A: No, I don't [*sic*].
> Q: Do you know if anyone from the restaurant such as your wife or employees cut them off?
> A: I don't know but they were like – I don't know.
> Q: Why do you know they were not drinking anymore?
> A: Maybe they were drinking, I don't know.
> Q: So, you also don't know if they continued to drink?
> A: Yes.

(Lerner EBT at 83).

Lerner also testified about the layout of the steam room in which Plaintiff alleges she was assaulted and about the spa's procedures for massages. He stated that the spa maintained a massage table in the steam room in addition to one in each of three designated massage rooms. He further claimed that guests would have to make reservations to receive massages in the massage rooms but that anyone could use the steam room massage table and that neither he nor spa employees would stop guests from giving massages on the steam room table (Lerner EBT at 64-65). However, Lerner also testified that "no one can offer massages in the common area" and "[i]f someone want to [*sic*] offer a massage, my employee[s] say no and they have to send them to front desk to make appointment for massage" (*id*. at 63). Plaintiff's testimony differed on this

question, as she testified, based on her previous visits, that patrons could ask for a massage without a reservation and that sometimes spa personnel would approach patrons on the floor and in the steam room and ask if they wanted a massage (Plaintiff EBT at 23).

Lerner also testified that there were security cameras at the spa and that there was "a camera on the level" where the fight occurred, but that this camera was either "not working" or not located at the location of the fight (Lerner EBT at 86-87). He further stated that, although there were cameras on the floor on which the steam room was located, there was no camera in or around the steam room that could record activity inside it (*id*. at 86). Lerner represented that no other sexual assaults have previously occurred at the spa, no other serious crimes had ever occurred at the spa, and that nobody had ever been arrested on the premises before (*id.* at 65-66, 104).

Plaintiff commenced this action on September 11, 2019, asserting a negligence cause of action against Defendant. Defendant moved, on June 2, 2022, for an order pursuant to CPLR 3212 granting summary judgment dismissing Plaintiff's Complaint in its entirety.

In a motion for summary judgment, the moving party "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). After the movant makes this prima facie showing, "the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" such that trial of the action is required (*id.*). The Court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A property owner has a duty to exercise reasonable care in maintaining its property in a "reasonably safe condition under the circumstances" (*Galindo v Town of Clarkstown*, 2 NY2d 3d 633, 636 [2004]). This duty requires a property owner "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" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]). An owner must also "take minimal security precautions against reasonably foreseeable criminal acts by third parties" (*James v Jamie Towers Hous. Co.*, 99 NY2d 639, 641 [2003]), although such prior conduct does not need to be exactly the same as the conduct at issue (*see Jacqueline S. v City of New York*, 81 NY2d 288, 294-295 [1993]).

An owner may be held liable for "injuries caused by an intoxicated guest" where the injuries occur on the owner's property, or in an area under the owner's control, where the owner "had the opportunity to supervise the intoxicated guest" (*D'Amico v Christie*, 71 NY2d at 85). Although an "owner of a public establishment has no duty to protect its patrons from unforeseeable and unexpected assaults," it "nevertheless has the duty to control the conduct of persons present on its premises when it has the opportunity to control or is reasonably aware of

the necessity of such control" (*Rivera v 21st Century Restaurant*, 199 AFD2d 14, 15 [1st Dept 1993] [citations omitted]; *see also Matz v Nettles*, 137 AD3d 667 [1st Dept 2016]).

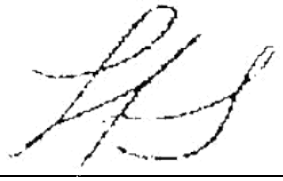
Defendant argues that it is entitled to summary judgment as a matter of law because there is no issue of material fact as to whether it was on notice of criminal conduct of the type alleged by Plaintiff and that the alleged sexual assault of Plaintiff by another guest was therefore unforeseeable as a matter of law. In opposition, Plaintiff contends that there are issues of fact regarding the foreseeability of her assault because of her assailant's possible involvement in at least one physical fight with another spa guest prior to her alleged sexual assault. Plaintiff contends that the issue as to whether her assailant was involved in a fight is probative as to whether Defendant violated the applicable standard of care by failing to remove this person from the premises after fighting with another guest.

Defendant's motion is denied. The deposition testimonies of Plaintiff and Defendant's manager differ on when a fight involving Plaintiff's alleged assailant took place and whether this individual was engaged in multiple fights. An issue of fact therefore exists as to whether Defendant was reasonably aware of the need to control the behavior of Plaintiff's alleged assailant and whether the alleged sexual assault of Plaintiff by this individual was reasonably foreseeable (*see Matz*, 137 AD3d at 667]). Furthermore, Defendant's manager Lerner conceded that he did not remove a group of individuals that included the alleged assailant after they engaged in a fight, that he did not monitor this group after the fight, and that he did not cut off their drinking or know whether anyone else at the spa did so. Defendant has therefore failed to establish the absence of an issue of fact as to whether it satisfied its duty of to control the behavior of Plaintiff's alleged assailant (*cf. D'Amico*, 71 NY2d at 85; *Matz*, 137 AD3d at 667 [1st Dept 2016]). Finally, Lerner's testimony that the spa security cameras were either not

functional or positioned to record either the alleged fight(s) or the sexual assault of Plaintiff and that spa employees would not stop guests from giving massages on the steam room table demonstrate that an issue of fact exists with respect to whether Defendant met its duty to take minimal security precautions (*see James*, 99 NY2d at 641). Viewing the facts in the light most favorable to the non-moving party, the Court finds that material issues of fact exist as to whether Defendant was reasonably aware of the need to control the conduct of patrons who engaged in violent behavior on its premises, whether it satisfied its duty to control their conduct in the event it was reasonably aware of such need, and whether it failed to satisfy its duty to protect Plaintiff from a foreseeable violent criminal act of a third party (*see, e.g., D'Amico*, 71 NY2d at 85; *Rivera*, 199 AD2d at 15; *Jacqueline S.*, 81 NY2d at 294-295).

Accordingly, it is hereby:

ORDERED that defendant's motion for summary judgment is denied.



2/15/2023
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**