

Fleyhan v RM Holdings Co., Inc.

2009 NY Slip Op 31161(U)

May 9, 2009

Supreme Court, New York County

Docket Number: 114239/2006

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**
J.S.C.
Justice

PART 2

Index Number : 114239/2006

FLEYHAN, SAMI

vs

RM HOLDINGS

Sequence Number : 001

DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

~~Motion to Dismiss with Accompanying~~
~~the decision dictated on the record.~~
MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 5/9/09

LBY
LOUIS B. YORK *J.S.C.*
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----x
SAMI FLEYHAN,

Plaintiff, Index # 114239/2006

-against-

RM HOLDINGS COMPANY, INC; JMED HOLDINGS,
LLC d/b/a PACHA and "JOHN DOE," whose
first and last name being unknown and
fictitious and EXCALIBUR, LLC

Defendants.

-----x

YORK, J.:

In this action, which arises out of the stabbing/assault of plaintiff nightclub patron, Sami Fleyhan, by an unknown assailant at Club Pacha, owned and operated by defendant JMED Holdings LLC d/b/a Pacha (JMED), JMED and the premises' out-of-possession landlord, codefendant RM Holdings Company, Inc. (RM), move for an order granting them summary judgment dismissing this negligence action as to them and granting them summary judgment on their cross claims, sounding in common-law and contractual indemnity and contribution, against the security company retained by JMED, codefendant Excalibur, LLC (Excalibur). Excalibur opposes that branch of codefendants' motion which seeks summary judgment on their cross claims, and cross moves for an order granting it

summary judgment dismissing Fleyhan's complaint as well as RM and JMED's cross claims.

Background and Facts

RM is a real estate holding corporation which owns the commercial building in issue, which it leased to Metropolitan Lumber, the holder of the master lease. Metropolitan subleased the basement and the first, second and third floors to JMED to be used as a club. According to Fleyhan's counsel, the club had a capacity of 1,200 persons. It is undisputed that RM's duties with respect to the building were limited, and that it had the right to enter the subleased premises for emergencies and certain repairs, provided advance notice was given to JMED, but RM had no involvement in providing security for the subleased premises according to Gans' ebt. The November 2004 sublease (at Article 48) made JMED fully responsible for security for the demised premises and required JMED to hire a professional security company with at least five years experience in crowd control and venue security, which provided at least six security personnel outside the club every night. This latter provision was due to problems with a prior tenant and to assist Metropolitan to obtain a new liquor license.

On February 22, 2006, Pacha entered into a security contract with Excalibur. The contract provided that Excalibur was to

protect the venue's property, its employees and "other persons on the property" from any potentially dangerous activities." Excalibur was to provide properly trained personnel on duty at dates and times as mutually agreed between Excalibur and Pacha's management. Pacha was to inform Excalibur of the general nature of the services requested, but the specific manner of performance was to be in Excalibur's exclusive control. The security agreement also provided that all service related equipment supplied by Excalibur were to remain Excalibur's property.

Excalibur was required to maintain general liability insurance with a limit of at least \$1 million per occurrence and \$2 million aggregate, covering, among other things, assault and battery and bodily injury. The policy was to name Pacha and its landlord as additional insureds. The contract required Excalibur to indemnify Pacha and the venue's landlord against all claims, liabilities and expenses, including counsels' fees for personal injuries derived from the provision of security services under the agreement, for damages caused by any breach of the agreement, and for all claims of sole or contributory negligence by Excalibur or its personnel. Pacha agreed to indemnify Excalibur for any damages for which Excalibur may become liable caused by any of Pacha's breaches under the agreement or intentional or negligent acts, without there having been any fault on the part of Excalibur.

Fleyhan left for Pacha with three others on Friday, Memorial Day weekend, arriving there at about 12:30 a.m. on the 27th of May. He stood outside on a long line for about 15-20 minutes, where he saw one security guard outside and a male and female bouncer, each wearing a black uniform, inside the door. Fleyhan showed his I.D. to the bouncer outside and then entered the door, where the male bouncer searched him. Fleyhan described the search as brief and lasting less than five seconds because of the long line. The search consisted of a quick passing of the bouncer's hands from the chest to the pocket area to the socks without detectors. Fleyhan did not see any bouncers other than those when he entered the club. The club had several dance floors, and Fleyhan spent most of the evening on the level that contained a bar, a D.J. station and a 7,000 square foot dance floor. After he was in the club for several hours, Fleyhan, walked around on the dance floor looking for his cousin and accidentally bumped into a man wearing sunglasses. The man immediately hit Fleyhan in his lower back with his elbow. Fleyhan apologized and kept walking, but the man, who did not ever talk to Fleyhan, followed him to the other side of the dance floor. Fleyhan was unaware that the man was following him, until he got to the other side of the dance floor. Between the time of the elbowing and the second encounter with the man, about 15 seconds elapsed. Fleyhan, feeling threatened, apologized again and

said that he did not want any trouble. Fleyhan was about to walk away, when the man stabbed him in the stomach. Fleyhan did not see the knife until after he was first stabbed. Then, the attacker was waving the knife. Fleyhan tried to protect himself and pushed the man away and dislocated his shoulder. During the incident Fleyhan started waving. The attacker then stabbed Fleyhan in the chest and his lower back. The initial stabbing until the final stabbing took 30 seconds to a minute. The stabbing took place in the presence of people on the dance floor. Although it was dark and noisy in the club, according to Fleyhan, a lot of people saw the incident, but did nothing. The man then fled. Fleyhan did not say anything to the man as he left. Also, he never yelled out for help. Fleyhan's cousin allegedly saw the end of the incident, came to his help, showed him the exit sign and went to look for a bouncer. Fleyhan was let out of an emergency exit after telling the person manning that exit that he was injured, and eventually went via a taxi to the hospital. Fleyhan did not believe that the man at the exit was a bouncer, but instead thought he was a club employee. However, Fleyhan did not report the incident to anyone at the club. He eventually needed surgery for his dislocated shoulder.

Fleyhan stated in his deposition prior to the incident, he saw from near the dance floor another altercation in which several people next to the bar were hitting each other and possibly

throwing glasses. No bouncers were present, and no one responded to that incident.

Fleyhan commenced this negligence action against RM and Pacha and then amended the complaint to reflect that Pacha was actually the name under which JMED did business and add Excalibur as a defendant. The amended complaint asserts one cause of action sounding in negligence against all of the defendants. Fleyhan's bill of particulars asserts that the defendants were negligent in their hiring and training of security personnel and in failing to have a sufficient number of security personnel at the door, to have metal detectors and metal detector wands, to properly pat down and search those entering the club, to have sufficient security personnel in the club to prevent the assault and to stop the incident once it commenced, and to adhere to nightclub industry standards regarding using security equipment to prevent people from entering the club with weapons and to protect against those attempting to enter the club with a weapon or device. As a result of the defendants' alleged negligence, Fleyhan asserts that he has suffered permanent physical and emotional injuries.

The Instant Applications

RM and JMED seek dismissal of Fleyhan's complaint on the grounds that the assailant's acts were sudden, unexpected, unforeseeable and incapable of being prevented and that the

security services were exclusively provided by Excalibur, so that any liability for Fleyhan's injuries would fall on it. In addition RM seeks summary judgement on the ground that as a mere out-of-possession landlord, which did not operate the club, it owed no duty to Fleyhan. JMED also asserts in its memorandum of law that it cannot be held liable for any negligent supervision, training or hiring claims with respect to its own employees because all of its employees were acting within the scope of their employment, so that if any such employee was negligent JMED will be liable vicariously regardless of any negligent hiring, supervision or training. RM and JMED, although not alleging or attempting to establish on this motion that Excalibur was negligent or that it breached the security agreement, also seek summary judgment on their cross claims for contractual and common-law indemnity and contribution.

Excalibur cross moves for an order granting it summary judgment on its cross claims against codefendants and dismissing Fleyhan's complaint. Preliminarily, Excalibur asserts that its cross motion is timely. Although the note of issue was filed on February 12, 2008, and, pursuant to a the court's discovery orders, the parties had to move for summary judgment within 60 days of the filing of the note of issue, Excalibur served its cross motion for summary judgment on May 12, 2008. Excalibur maintains that its cross motion relates back to the filing of codefendants' motion and

that, in any event, its application should be entertained because it is being made on nearly identical grounds as the motion, and because counsel has a reasonable excuse for not making the motion within the 60-day period.

Substantively Excalibur asserts that the codefendants' cross claims are barred by the anti-subrogation rule since their defense of this action was assumed by Excalibur's insurance carrier, Scottsdale Insurance Company (Scottsdale). Excalibur further maintains that even if codefendants' cross claims are not so barred, they must be dismissed because Excalibur owed no duty to Fleyhan since he was not a third-party beneficiary of the security contract and because the facts of this case do not warrant a finding that a duty was otherwise owed to Fleyhan. In addition, Excalibur urges that the attack on Fleyhan was unforeseeable and incapable of prevention thereby warranting the dismissal of Fleyhan's complaint.

In response to Excalibur's application to dismiss the codefendants' cross claims as barred by the anti-subrogation rule, JMED and RM, who do not dispute that Scottsdale assumed their defense of this action, assert that the rule has no application to claims in excess of the policy limits. JMED and RM note that Scottsdale commenced a declaratory judgment action arising out of multiple personal injury and/or wrongful death actions/claims,

including Fleyhan's, asserted against Excalibur in connection with nightclub security services it provided to a number of clubs. In that stakeholder interpleader action Scottsdale alleged that, as a result of the multiple claims, it was expected that the settlements/judgments would exceed the aggregate policy limit of coverage under the assault and battery endorsement. It further alleged that exhaustion of the aggregate limit terminates policy coverage and its duty to defend and indemnify. Thus Scottsdale asked to deposit the aggregate limit in court for the court's eventual distribution and sought a declaration that it had no further defense or indemnity obligations to any of the defendants in that action. In light of the fact that exhaustion of the policy seems likely and that a jury in the instant case could render a verdict that exceeds any amount available under the policy, JMED and RM maintain that their cross claims are not barred by the anti-subrogation rule.

Fleyhan opposes defendants' applications to dismiss his complaint, and asserts that they have failed to prima facie meet their burden of establishing their entitlement to summary judgment by eliminating all material allegations raised by the pleadings. Fleyhan also offers the affidavit of its security expert, who incorporates by reference his report dated June 18, 2008 and evidently made specifically to oppose the defendants' motion and

cross motion. JMED and RM assert that this expert's affidavit should be rejected since it is based on a report which was not timely furnished pursuant to my preliminary conference order which required all CPLR 3101(d) reports to be served within 60 days of the filing of the note of issue on February 12, 2008.

As a threshold matter, although Excalibur has not offered a reasonable excuse for failing to timely serve its cross motion, in light of the fact that its cross motion is in part intertwined with its opposition to codefendants' application seeking summary judgment on its cross claims and codefendants' application to dismiss Fleyhan's complaint, I will, in the exercise of my discretion entertain it. See *Fahrenheit v Security Mutual Insurance Co.*, 32 AD3d 1326 (4th Dept, 2006).

The branch of RM's application which seeks dismissal of plaintiff's claims against it on the ground that it was an out-of-possession landlord with no duty toward Fleyhan, is granted, since it is undisputed that RM did not retain control over the premises, the operation of Pacha, or the security operations. *Borelli v 1051 Realty Corp*, 242 AD2d 517 (2d Dept, 1997). In light of the dismissal of the complaint as to RM, its claims for contribution and indemnity asserted against Excalibur are also dismissed. It is not disputed that, to the extent that RM sought contractual

indemnity from Excalibur for legal expenses, RM incurred no such expenses because Scottsdale provided RM with a defense in this action. In addition since the complaint has been dismissed as to RM, Excalibur's cross claims against RM for contribution and indemnity must be, and hereby are, dismissed. In this regard, I also note that the security contract does not require RM to contractually indemnify Excalibur.

The branch of Excalibur's motion which seeks dismissal of JMED's indemnity and contribution claims as barred by the anti-subrogation rule is granted by dismissing JMED's contribution and indemnity claims against Excalibur to the extent that JMED seeks recovery against Excalibur for the amount ultimately covered by the Scottsdale policy (*See Lodovichetti v Baez*, 31 AD3d 718 [2d Dept, 2006]; *Kvandal v Westminster Presbyterian Society of Buffalo*, 238 AD2d 889 [4th Dept, 1997]; *Pierce v Syracuse University*, 236 AD2d 870 [4th Dept, 1997]). This amount is unclear at this time in light of the significant possibility that Scottsdale's aggregate policy limit may well be exhausted by claims brought by others. The branches of JMED's motion and Excalibur's cross motion seeking summary judgment on their respective contribution and indemnity claims are denied as premature. *See Kvandel*, 238 AD2d at 890.

The branch of JMED's motion which seeks dismissal of the negligent hiring, training and supervision claims on the ground that it will be vicariously liable for any negligence on the part of its employees is granted. See *Talavera v Arbit*, 18 AD3d 738 (2d Dept, 2005); *Weinberg v Guttman Breast & Diagnostic Inst.*, 254 AD2d 213 (1st Dept, 1998).

The branch of Excalibur's cross motion which seeks dismissal of Fleyhan's complaint on the ground that he was not a third-party beneficiary of the contract between it and Pacha/JMED is denied. The contract clearly provides that Excalibur was required to protect not only Pacha's premises and employees, but also other persons on the premises. In addition Excalibur was required to have insurance naming Pacha and RM as additional insureds protecting against claims for assault and battery and bodily injury, and agreed to indemnify Pacha and RM against claims of personal injury arising out of the provision of security services under the security contract and for its negligence. In light of the foregoing, this branch of the cross motion is denied. See, e.g. *Cruz v Madison Detective Bureau, Inc.*, 137 AD2d 86 (1st Dept, 1988); *Kotchina v Luna Park Housing Corp*, 27 AD3d 696 (2d Dept, 2006).

The balance of JMED's motion and Excalibur's cross motion which seeks dismissal of Fleyhan's complaint is denied. As the movants they have the burden in the first instance of prima facie

eliminating all material claims raised by the pleadings. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). A failure to meet such burden mandates the denial of the summary judgment applications irrespective of the adequacy of the opposing papers. *Id.* at 324. Merely pointing to the gaps in a plaintiff's proof is inadequate to obtain summary judgment. *Bryan v Church Associates, LLC*, -AD3d-, 2009 WL 823561 (1st Dept).

While neither JMED nor Excalibur was an insurer of the safety of the club's patrons, they had a duty to maintain the premises in a reasonably safe condition under all the circumstances including, taking into consideration the nature of the particular premises, the likelihood of injury to those on the premises, and how burdensome it would be to prevent the risk of injury. *Nash v Port Authority of New York and New Jersey*, 51 AD3d 337 (1st Dept, 2008). A defendant's notice of the risk to be perceived need not come from prior crimes at the premises in issue (*Id.*, *Rudel v National Jewelry Exchange Co.*, 213 AD2d 301 [1st Dept, 1995]), nor must it be demonstrated that prior criminal activity was of exactly the same type (*Florman v City of New York*, 293 AD2d 120 [1st Dept, 2003]). A defendant's duty to secure the premises from foreseeable criminal activity is fact specific and is usually a jury issue. *Nash*, 51 AD3d at 349.

JMED and Excalibur have failed to establish that they were not negligent and that Fleyhan's injuries were not proximately caused by their negligence. No security expert affidavit has been provided by either movant establishing the adequacy of the security measures provided for this particular business, including the necessity of metal detecting devices, the need to patdown all those entering the club, or regarding the adequacy of the number and placement of the security personnel on the premises. As is relevant, all that has been provided are the deposition transcripts of Jarrod Khoury, JMED's assistant general manager, who did not offer any testimony on whether he was involved in the initial obtaining of Excalibur's services or in negotiating the terms of the security contract, and of Edward Troiano, one of Excalibur's owners, who was not involved in the initial discussions with JMED about setting up security, including what was to be done, and who was not "privy" to that information (Troiano ebt at 30-31). While Khoury testified that there were no metal detectors at the club, he did not know whether they or metal detecting wands had been requested by Excalibur (Khoury ebt at 63), and there was no evidence provided by movants as to whether they were recommended by Excalibur and if so, whether they were declined by JMED. Troiano did not know whether there was any industry standard or protocol requiring a club of Pacha's size and nature to have metal detecting

devices. *Id.* at 33-34. Also, it is unclear from the record who was to be searched upon entering the club and whether every patron was to be searched. While defense counsel surmises that the assault may have been carried out by a JMED employee or someone else who was not a club patron, the fact that the assault occurred in the middle of the dance floor makes counsel's assertion improbable. Regarding the searches, Khoury testified that when a knife was found on someone they would be asked to leave. Troiano testified that people were searched at the door and that a search, which was from head to toe would last from 15-20 seconds, or "[w]hatever it takes." He further testified that he did not train the Excalibur employees who conducted the searches and was not privy to how they were trained to do searches. If a knife were found, the Excalibur employees were instructed to take it to the head of security and to Pacha management. Presumably both JMED and Excalibur were aware of the danger of weapons being brought into the club; otherwise, there would not have been a patdown procedure. While Troiano testified that New York State security guard certification cards were required by the State, some Excalibur employees had such cards but others only had applications pending.

Troiano testified that he was aware of incidents of assaults/altercations, including the shooting of four people, at clubs where

Excalibur provided security. He indicated that at the time in issue Excalibur provided security services for four other clubs on the strip. *Id.* at 12. He also testified (*Id.* at 43) that his instructions with respect to Pacha in the event of a fight or altercation, were to restrain the individuals, fill out an incident report and call the police if there were blood or violence. Khoury testified (ebs at 44-45) that prior to the incident involving Fleyhan, he was aware of other altercations or fights at Pacha, but was unsure of whether the police were called regarding fights or altercations. Khoury further testified that he had filled out incident reports for other fights and altercations but could not approximate how many. *Id.* at 49.

Although Khoury testified that all security services were provided by Excalibur and that JMED's employees did not provide security services, the decision as to how many security people were to be provided on any night and where in the club they were to be positioned was a collaborative decision between Excalibur and JMED. They would get together periodically to make such determinations. Troiano guessed that the dance floor in issue required, depending on the crowd and type of D.J. present, two to eight security personnel. No testimony was offered as to how many people were at the club or expected there on the night in issue or how many

security personnel were required that night. According to the security post sheet of the day in issue, there were no security personnel positioned anywhere in the vicinity of the dance floor, and it is unclear from that sheet how long each security guard was present elsewhere in the club.

Video surveillance cameras were installed by an entity other than Excalibur in various locations throughout the club, including the dance floor, but Khoury did not know if they were monitored live or whether Excalibur had any monitoring duties. Khoury also did not know if the tapes still existed or whether they were ever provided to the police. Troiano testified that Excalibur had no video monitoring duties.

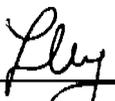
It is readily apparent from the foregoing that neither JMED nor Excalibur have met their prima facie burden of eliminating the material allegations raised by Fleyhan's pleadings by demonstrating that, in light of the nature of the business conducted at the premises and their knowledge that altercations could arise, they were not negligent with respect to providing security and/or that Fleyhan's injuries were not proximately caused by their negligence. Issues remain as to, among other things, whether adequate uniformed security personnel were in place to conduct adequate patdown searches, which according to Fleyhan were rather perfunctory, whether metal detecting devices were required, and whether there

were adequate uniformed security personnel throughout the club, including in the vicinity the dance floor, to serve as a deterrent and to intervene once the altercation, which lasted 30 seconds to a minute, arose, so as to minimize Fleyhan's injuries.

In light of the foregoing Fleyhan's complaint is dismissed as to RM, RM's cross claims against Excalibur are dismissed as are Excalibur's cross claims against RM, the claims against JMED asserting that it was negligent in the hiring, training and supervising of those for whom it is vicariously liable are dismissed, and the cross claims asserted by JMED against Excalibur are dismissed to the extent that JMED seeks recovery from Excalibur for the amount ultimately covered by the Scottsdale policy. JMED's and Excalibur's applications for summary judgment on their respective cross claims are denied. The branches of JMED's motion and Excalibur's cross motion which seek dismissal of Fleyhan's complaint are denied.

Settle order.

Dated: May 9, 2009



J.S.C.