

**Diaz v 144th Place Owners Corp.**

2011 NY Slip Op 31063(U)

March 22, 2011

Supreme Court, Queens County

Docket Number: 3667/09

Judge: Howard G. Lane

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if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

Defendants established a prima facie case that the plaintiff's lawsuit against 144<sup>th</sup> Place Owners Corp. should be dismissed in its entirety since 144<sup>th</sup> Place Owners Corp. was an out-of-possession/absentee landlord of the premises and "[t]he law is clear [in the State of New York] that an absentee landlord is not liable for a lessee's negligent supervision of an invited guest" (*Jessup v. Hedberg*, 196 AD2d 857 [2d Dept 1993]). It is well-established law that "[a] landowner has the duty to control the conduct of persons present on his premises when he has the opportunity to control or is reasonable aware of the necessity of such control. There is no legal duty, however, 'to protect against an occurrence which is extraordinary in nature and, as such, would not suggest itself to a reasonably careful and prudent person as one which should be guarded against'". (*Lindskog v. Southland Restaurant, Inc.*, 160 AD2d 842 [2d Dept 1990][internal citations omitted]). Pursuant to the examination before trial transcript testimony of Mohamed Ali: 144<sup>th</sup> Place Owners Corp. leases the premises to Amazura, Inc., other than leasing the subject space to Amazura, Inc. neither he nor 144<sup>th</sup> Place Owners Corp. have any involvement in the operation of

Amazura and he rarely visits the premises, he has no ownership interest of any kind in Amazura, Inc. Pursuant to the affidavit of Mohamed Ali, he is a shareholder of 144<sup>th</sup> Place Owners Corp., whose sole business is the ownership of the premises, 144<sup>th</sup> Place Owners Corp. is an out-of-possession/absentee landlord of the premises and has absolutely no involvement in the operation and business of Amazura, 144<sup>th</sup> Place Owners Corp. merely leases the premises to Amazura, Inc. and collects rents from the same, leaving Amazura, Inc. to operate its business as it deems fit.

Defendants established a prima facie case that the plaintiff's lawsuit against defendant Mohamed Ali should be dismissed in its entirety. Defendants established a prima facie case that Mohamed Ali is merely a shareholder of 144<sup>th</sup> Place Owners Corp. and as such, he is not personally liable for the actions of the corporation. Additionally, plaintiff failed to allege that the corporate veil of 144<sup>th</sup> Place Owners Corp. should be pierced so as to hold defendant Mohamed Ali personally liable (*Joan Hansen & Company, Inc. v. Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1<sup>st</sup> Dept 2002]; see also, *American Medical and Life Ins. Co. v. Crosssummit Enterprises, Inc.*, 910 NYS2d 403 [Sup Ct, Nassau County 2010]) (holding that it is a general rule that when officers and directors are acting in their corporate capacities, they cannot be held personally liable). The examination before trial transcript testimony of defendant Mohamed Ali indicates that Amazura, Inc. paid rent to 144<sup>th</sup> Place Owners Corp. and not to him personally, and that 144<sup>th</sup> Place Owners Corp. maintained a separate bank account. The examination before trial transcript testimony of defendant Rohan Ali, a shareholder of Amazura, Inc. established that Amazura, Inc. paid rent to 144<sup>th</sup> Place Owners Corp. and not to Mohamed Ali as an individual.

Defendants established a prima facie case that the plaintiff's lawsuit against defendant Amazura, Inc. should be dismissed in its entirety. Defendants establish that plaintiff has not presented any objective evidence that he sustained a personal injury when he was a patron of Amazura. As such, Amazura, Inc. did not owe him any duty for which liability can be imposed on the company for his alleged personal injury. Assuming arguendo, that plaintiff was injured when he was on the premises, Amazura, Inc. cannot be held responsible for the plaintiff's alleged personal injury because the physical altercation that the plaintiff alleges caused him to get injured was completely unforeseeable and unexpected. "[T]he owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults." (*Giambruno v. Crazy Donkey Bar and Grill*, 65 AD3d 1190 [2d Dept 2009]). The plaintiff cannot

explain his whereabouts after he left Amazura at 4:00 a.m. and arrived at Jamaica Hospital Medical Center at 5:04 a.m. Rohan Ali's examination before trial transcript testimony indicated that he was present at Amazura during the night in question and there was absolutely no indication that a physical altercation was going to break out at the club. The plaintiff's own examination before trial transcript testimony indicates that the alleged physical altercation did not involve him in any way, that he was able to leave the scene of the physical altercation, but instead voluntarily joined the dispute. Finally, the examination before trial transcript testimony of defendant Rohan Ali established that there was extensive security in place at Amazura in general and on the specific night of the plaintiff's alleged injury.

Defendants established a prima facie case that the plaintiff's lawsuit against defendant Rohan Ali should be dismissed in its entirety. Defendants established that Rohan Ali is merely a shareholder of Amazura, Inc. and as such, he is not personally liable for the actions of the corporation. The plaintiff failed to allege that the corporate veil of Amazura Inc. should be pierced so as to hold Rohan Ali personally liable. The examination before trial transcript testimony of Rohan Ali established that Amazura, Inc. maintained a separate corporate bank account and that the corporation paid rent from said account to 144<sup>th</sup> Place Owners Corp. The examination before trial transcript testimony of Mohamed Ali confirmed that Amazura, Inc. and not Rohan Ali, paid rent to 144<sup>th</sup> Place Owners Corp. for the premises.

In opposition, plaintiff failed to raise triable issues of fact as to defendants Mohamed Ali and Rohan Ali. Plaintiff failed to rebut defendants' contention that Mohamed Ali and Rohan Ali are not personally liable for the alleged actions of their respective corporations.

In opposition, plaintiff raised a triable issue of fact as to the liability of defendant 144<sup>th</sup> Place Owners Corp. Plaintiff submits, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testified that prior to being struck the first time, two other members of his party, were struck by other patrons; and the examination before trial transcript testimony of Mohamed Ali, sole shareholder and owner of 144<sup>th</sup> Place Owner's Corp., who testified that he had become aware of incidents at the club prior to the incident alleged herein. There are triable issues of fact as to whether 144<sup>th</sup> Owners Corp. was reasonably aware of the need for control of the leased premises and whether they had an opportunity to effectuate

that control.

In opposition, plaintiff raised a triable issue of fact as to the liability of defendant, Amazura, Inc. Plaintiff submits, inter alia, the examination before trial transcript testimony of plaintiff himself, wherein he testified that prior to being struck the first time, two other members of his party, were struck by other patrons, that what drew his attention to the area where his friends were being assaulted was the "oohs and ahhs" of the crowd reacting to the ongoing violence, that he saw no more than 4 security guards throughout the night; and the examination before trial transcript testimony of defendant Rohan Ali, the owner and operator of Amazura, who testified that he was aware of incidents/altercations within the club prior to the incident alleged herein. Accordingly, there is a triable issue of fact as to whether the incident was foreseeable or unexpected.

Accordingly, the Complaint is dismissed against individual defendants Mohamed Ali and Rohan Ali and remains against corporate defendants 144<sup>th</sup> Place Owners Corp. and Amazura, Inc.

This constitutes the decision and order of the Court.

Dated: March 22, 2011

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**Howard G. Lane, J.S.C.**