

Maheshwari v City of New York

2001 NY Slip Op 30056(U)

September 24, 2001

Supreme Court, New York County

Docket Number: 112014/97

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MARCY S. FRIEDMAN, J.S.C.

PRESENT: _____
Justice

PART 5

Mafeshwan
- v -
City

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 05
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 1a, 1c</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits <u>Memo of Law</u> _____	<u>3-5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted per
decision/order dated 9/24/01

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/24/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Duplicate Original
Motion Seq #05
MF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----X

RAM KRISHNA MAHESHWARI AND PUSHPLATA
MAHESHWARI,

Plaintiffs,

-against-

Index No. 112014/97

THE CITY OF NEW YORK, DELSENER/SLATER
ENTERPRISES, INC., RANDALL'S ISLAND
SPORTS FOUNDATION, INC., KEITH KEVAN
ORGANIZATION, INC. and KEITH KEVAN,

Defendants.

-----X

MARCY FRIEDMAN, J:

In this personal injury action, plaintiff Ram Krishna Maheshwari sues to recover for injuries sustained when he was assaulted by two to four unknown individuals in the Sunken Meadow area of Randall's Island, which was being used as a parking area for "Lollapalooza '96," a music festival held at Downing Stadium. Defendant Delsener Slater Enterprises, Inc. ("Delsener") moves for summary judgment dismissing all claims against it. Defendants Keith Kevan Organization, Ltd. and Keith Kevan (collectively "Kevan"), also move for summary judgment dismissing all claims against them.

Defendant City of New York ("City"), as owner of Downing Stadium, entered into a Stadium Use Authorization agreement ("agreement") with Delsener, the producer of the festival, granting Delsener a permit to use Downing Stadium and the parking fields for purposes of holding the festival on July 10 and 11, 1996. The Kevan defendants, which were hired by Delsener to perform concert production services for the festival, were not parties to this agreement.

Paragraph 4 of the Stadium Use Authorization agreement required Delsener to prepare and submit for the approval of the Commissioner of the Department of Parks and Recreation an operations plan “for public vehicular and pedestrian traffic circulation, parking control, and security from the Triborough Bridge ramps and the access roads to the designated ballfields to be used for parking and access to the stadium area.” (Agreement, ¶ 4[a][i].) This plan was required to include “the number, location and hours of deployment of licensed security personnel assigned to the stadium, the parking fields, [and] Triborough Bridge access roads” (*id.*, ¶4[a][iii]), and “the location and number of personnel assigned to monitor the Event parking lots * * * and provide security in the parking lots* * *.” (¶ 4[a][vii].)

Paragraph 35(c)(iii) of the contract provided that Delsener, “at its sole cost and expense, shall provide, hire, train and supervise all personnel necessary, excluding City employees performing duties in the course of their City employment, for the proper operation of this Stadium Use Authorization, including but not limited to * * * sufficient trained security personnel as may be necessary, including but not limited to uniformed special policemen, private security guards, licensed fire guards, ticket sellers, ticket takers, ushers, and first -aid station personnel for: parking and traffic flow.”

The Stadium Use Authorization agreement thus clearly obligated Delsener to provide security in the ballfields used as parking lots for the concert. However, an “All Agency Meeting” was held on June 27, 1996, during which security requirements for the festival were discussed. Delsener, the Kevan defendants, the Parks Department and the New York City Police Department (“NYPD”) all attended this meeting. It is undisputed by all parties that their “understanding,” following this meeting, was that Delsener would provide security inside

Downing Stadium and at its perimeter, and that the NYPD and the Parks Department would provide security in the parking areas, including the Sunken Meadow area. (See, Dep. Of Mark Aronson [Delsener's Chief Financial Officer], at 40-41, 103, 105-109; Apr. 13, 2000 Dep. Of Neil Spadaro [NYPD Deputy Inspector], at 132-134, 154, 162; Dep. Of Robert Reeves [New York City Dept. of Parks and Recreation, Park and Recreation Manager], at 68-74.) It is further undisputed that Delsener did not provide any security in the parking lots.

Plaintiff contends that Delsener was negligent in failing to provide adequate security in the parking lot where plaintiff was allegedly assaulted. In support of its motion for summary judgment, Delsener contends that, even assuming that the agreement called for it to have security personnel in the parking lots, it owed no duty to plaintiff as a matter of law. The Kevan defendants likewise contend that they had no duty to provide security in the area where the assault occurred.

Plaintiff argues that Delsener's motion for summary judgment must be denied on the ground of collateral estoppel, as this Court has already ruled on the issues presented in Delsener's motion in Florman v City of New York, et al., Index No. 400580/98 (December 26, 2000) ("Florman"), which also involved injuries sustained during Lollapalooza '96.

The doctrine of collateral estoppel, or issue preclusion, bars the re-litigation of issues that have been actually litigated and necessarily decided in a prior action. (Kaufman v Eli Lilly & Co., 65 NY2d 449 [1985].) There are two requirements governing the application of collateral estoppel: (1) "[T]he identical issue necessarily must have been decided in the prior action and be decisive of the present action"; and (2) the party to be precluded from re-litigating an issue must have had "a full and fair opportunity to contest the prior determination." (Id., at 455.)

Delsener's instant motion for summary judgment is barred by collateral estoppel, as the issues raised by Delsener here are identical to those it raised in Florman. Accordingly, Delsener is precluded from re-litigating them.

On the instant motion, Delsener argues that, as a permittee with no ability to control who came onto the property in the Sunken Meadow area, it has no liability to plaintiff. In Florman, this court rejected the same argument. Citing Nallan v. Helmslev-Soear, Inc. (50 NY2d 507 [1980]), the court held that, as a possessor of the premises, Delsener had a duty to maintain the public areas of the premises in a reasonably safe condition for persons, including the plaintiff, who were admitted to the premises. In Florman, this court also held that because Delsener was granted unrestricted use of the stadium and parking fields by virtue of its contract with the City, it "stood in the shoes of an occupant or lessee of the premises who was subject to liability to third persons * * *for failure to maintain the premises in a reasonably safe condition."

Delsener also contends that it had no notice of prior criminal activity in the area, and therefore, no duty to provide security. This court squarely rejected this argument in Florman. Citing Burgundy Basin Inn, Ltd. v Watkins Glen Grand Prix Corp. (51 AD2d 140 [4* Dept 1976]), the court held that "the contract in the instant case gave notice to Delsener of the need for security."

Delsener also argues that even assuming it had an obligation under the contract with the City to provide security in Sunken Meadow, plaintiff is not a third-party beneficiary of that agreement. In Florman, this court fully considered this issue and concluded, citing Palka v Servicemaster Mgt. Servs. Corp. (83 NY2d 579 [1994]), that "by the terms of the contract, the services which Delsener was to provide were comprehensive and fully displaced security services

to be provided by the owner.” (Id., at 5.) Moreover, under the standards set forth in Palka, Delsener could not reasonably claim that it was unaware that individuals such as plaintiff would expect security services to be performed with ordinary prudence. The court accordingly held that the Florman plaintiff was “entitled to seek recovery as a third-party beneficiary under the contract between defendant Delsener and the City.”

In moving for summary judgment, Delsener’s principal argument is that it is not liable to plaintiff because the City, through the NYPD and Parks Department, assumed responsibility for security in the location where plaintiff alleges he was assaulted. In Florman, this Court held that even assuming that the NYPD assumed responsibility for all security outside the stadium, “Delsener fails to show that such assumption of responsibility relieved Delsener of any obligation to furnish security as a matter of law.” In so holding, the court noted that the record on the motion was “undeveloped as to the circumstances under which the City assumed responsibility for the outdoor security,” and that it was unclear whether the City took over the security voluntarily or because Delsener’s arrangements for security were inadequate.

On the Florman motion, Delsener did not annex the entire deposition of Police Department Deputy Inspector Neil Spadaro, the witness on whose testimony Delsener relies in arguing that the City assumed responsibility for the security, thereby relieving Delsener of its contractual obligation to provide security. On the instant motion, Delsener corrects this omission, annexing the complete transcripts of two depositions given by Inspector Spadaro. Delsener fails to explain its failure to annex the complete depositions in Florman. However, even if this court were to permit Delsener to re-litigate the issue of its liability, and even if the court were therefore to consider these transcripts, they do not demonstrate as a matter of law that

the City's assumption of security functions relieves Delsener of liability to plaintiff.

The transcripts of Inspector Spadaro's depositions, together with the other evidence in the record, demonstrate the absence of any dispute as to the circumstances under which the City assumed responsibility for security in the parking areas and, indeed, show that the City voluntarily assumed this responsibility. However, as this court also held in Florman, even assuming arguendo that the City's assumption of security eliminated Delsener's contractual obligation to provide security, it did not eliminate Delsener's independent common law duty, based on its status of possessor of the premises, to keep the premises in a reasonably safe condition for third party users. (See, Burgundy Basin Trm, Ltd. v Watkins Glen Grand Prix Corp. supra. Cf., Rotz v. City of New York, 143 AD2d 301 [1st Dept 1988].)

Delsener does not cite any authority to the contrary. Nor does Delsener point to any deposition testimony or other evidence which shows that the City's assumption of responsibility for the outdoor security divested Delsener of control of the parking areas, and that it could not have supplemented the police protection by posting private security guards in the parking areas. Under these circumstances, the court adheres to the holding of Florman that Delsener had a common law duty to keep the premises reasonably safe for third parties.

Finally, Delsener argues that this action must be dismissed against it because minimal security was provided to the subject parking lots. Delsener fails, however, to eliminate triable issues of fact as to the adequacy of the security. While Delsener contends that no security was provided by NYPD, and points to the absence of any record showing that officers were posted in the Sunken Meadow area (Aug. 4, 2000 Dep. Of Neil Spadaro, at 25), Inspector Spadaro testified based on personal knowledge that officers were assigned to the Sunken Meadow area (Apr. 13,

2000 Dep., at 51, 162; Aug. 4, 2000 Dep., at 116.) The credibility of Inspector Spadaro and the reasonableness of the security measures are issues for the jury. (See, Rotz v. City of New York, supra.)

Delsener accordingly fails to demonstrate entitlement to dismissal of the complaint. Delsener also moves for summary judgment dismissing the City's cross-claim for indemnification. Under paragraph 54 of the Stadium Use Authorization agreement, Delsener was obligated to indemnify the City "from any and all claims arising from Permittee's [Delsener's] operations pursuant to this Permit, or from the negligence or carelessness of employees, agents, contractors, servants, sublicensees or invitees of Permittee, except to the extent caused by City, its employees, contractors or agents' negligent acts or omissions." Delsener fails to demonstrate as a matter of law that the City was negligent in providing security to the parking area where plaintiff was allegedly injured. The branch of Delsener's motion for dismissal of the cross-claim must therefore also be denied.

The Kevan defendants also move for summary judgment dismissing the complaint against them on the ground, among others, that they did not have any duty to plaintiff to provide security for the festival.

"In order to prove a prima facie case of negligence, a plaintiff must establish: (1) the existence of a duty on the part of the defendant to the plaintiff, (2) a breach of that duty, and (3) injury suffered by the plaintiff as a result of the breach." (Iannelli v Powers, 114 AD2d 157, 161 [2d Dept], lv denied 68 NY2d 604 [1986]). "Absent a duty of care to the person injured, a party cannot be held liable in negligence." (Balsam v Delma Eng'g Corp., 139 AD2d 292, 296 [1st Dept 1988], lv dismissed in part, denied in part 73 NY2d 783 [1988], citing Palsgraf v Long Is.

R.R. Co., 248 *NY* 339, 342 [1928].)

In a premises liability case, “[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises.” (Balsam v Delma Eng’g Corp., *supra.*) A duty of care for the condition of the premises may be imposed on a defendant only if it has a sufficient degree of control over the property: “It is clear that control is the test which generally measures the responsibility of the owner or occupant of real property for defects relating to it.” (Turrisi v Ponderosa Inc., 179 AD2d 956, 958 [3d Dept 1992]). See also, Welwood v Assn. for Children with Down Syndrome, Inc., 248 AD2d 707 [2d Dept 1998].)

The Kevan defendants present evidence that they were not in possession or control of the parking area where plaintiffs assault allegedly occurred, and were not otherwise obligated to provide security for the parking areas. It is undisputed that the Kevan defendants were independent contractors hired by Delsener to perform concert production services. (Aronson Dep., at 82; Dep. Of Keith Kevan, at 6.) They were not parties to the Stadium Use Authorization agreement, and did not have a possessory interest in the parking area where the alleged assault occurred.

Nor is there evidence that the Kevan defendants assumed control over the parking areas, or undertook to provide any security in those areas. In his deposition, Keith Kevan acknowledged only minimal involvement in dealing with security (Kevan Dep., at 24-25), and insisted that “we never supplied [security] people in the parking fields.” (Id., at 29, 33-34.) He also testified that security was supplied by the City outside the stadium, and that “we just do the stadium and the immediate environs.” (Id., at 49-50.) Delsener’s witness testified broadly that the Kevan defendants’ responsibility included coordinating security for the festival. (See,

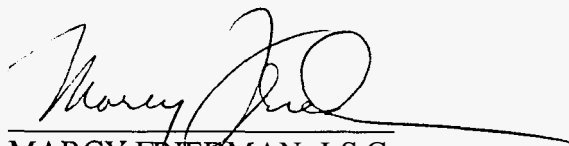
Aronson Dep., at 84-85.) However, Delsener does not in fact differ with Kevan as to Kevan's specific responsibilities concerning security. Delsener, like Kevan, takes the position that security was to be provided solely by the City in the parking areas. Thus, Delsener does not contend that it requested that Kevan provide or coordinate security in those areas. Moreover, it is undisputed that Kevan did not undertake to arrange for any security services in the parking areas.

In opposition to this showing by the Kevan defendants, plaintiff fails to come forward with any evidence to raise a triable issue of fact as to whether the Kevan defendants had possession or control of the parking area where plaintiff was allegedly assaulted. Under these circumstances, the court concludes as a matter of law that Kevan had neither a common law nor a contractual duty to provide security in such area. The Kevan defendants' summary judgment motion should accordingly be granted.

It is hereby ordered as follows: Delsener's motion for summary judgment is denied in its entirety. The Kevan defendants' motion is granted to the extent of awarding summary judgment to Keith Kevan Organization, Ltd., and Keith Kevan, dismissing all claims against them. The action is severed as to and shall proceed against the remaining defendants. The Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 24, 2001


MARCY FRIEDMAN, J.S.C.