

Lonkri v Very, Ltd.

2008 NY Slip Op 30106(U)

January 11, 2008

Supreme Court, New York County

Docket Number: 0105542/2004

Judge: Judith J. Gische

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ON 1/16/2008
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 105542/2004

LONKRI, YOSSI

vs

VERY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

s motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: January 11, 2008

J. GISCHE
HON. JUDITH J. GISCHE 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 10

-----X
Rossi Lonkri and Beth Lonkri,

Plaintiffs

-against-

Very, Ltd., Au Bar, Phillip Roth and
Emmanuel Digilov,

Defendants.
-----X

Decision/Order

Index No.: 105542/04

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Defs Very d/b/a Au Bar n/m [§ 3212], exhs	1
Pltf's opp w/JV affirm, exhs	2
ED opp w/RPS affirm	3
PR opp w/EMR affirm	4
Defs Very d/b/a Au Bar reply w/MJP affirm	5

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JAN 16 2008
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Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

This is a personal injury action arising from an assault at defendant Very, Ltd's establishment called "Au Bar." Defendants Phillip Roth and Emmanuel Digilov are alleged to have punched and kicked the plaintiff, Yossi Lonkri. Beth Lonkri, his wife, has asserted a derivative claim for loss of consortium.

The court has before it the motion by Very, Ltd./ Au Bar (hereinafter "Au Bar") for summary judgment dismissing the complaint, as well as the counterclaim against it by Roth. Plaintiffs and co-defendants Roth and Digilov all oppose the motion. Since issue has been joined, and this motion was brought in compliance with the requirements of CPLR § 3212, it

* 3]
will be heard and decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y. 3d 648 (2004).

Arguments

Mr. Lonskri contends that he was punched in the face at Au Bar by defendant Roth and while lying on the floor, kicked about the head by Roth and/or Digilov. Plaintiff contends that Au Bar's lack of sufficient and attentive security personnel was the proximate cause of his accident. He contends that he only observed two men providing security that night, even though the establishment was filled to capacity. Au Bar is a dance club and it serves alcohol. However, plaintiff has not alleged either Roth or Digilov were drunk when the incident occurred, but that they were openly hostile and combative.

Defendant Au Bar contends that plaintiff did not seek help when confronted by the two defendants, even though security was available. Plaintiff admits he did not call out or seek help, but contends that the music at the club was so loud, he doubts the bouncers could have heard him, even had he sought their attention. Plaintiff's wife was also deposed and she testified she could hear her husband and the men yelling as she neared the place they were standing. She did not seek any help either.

Plaintiffs contend that the incident was foreseeable. Both plaintiffs rely upon their deposition testimony, the affirmation of counsel, and the sworn affidavit of their private investigator to establish that there are factual disputes for trial. The investigator, a retired detective, opines that based upon his experience with the NYPD, dance clubs tend to be noisy and that this frenetic atmosphere, coupled with the presence of alcohol, fuels fights between patrons. Plaintiffs also provide and rely upon the deposition testimony of Au Bar's

head of security (Mr. Savage). He testified that the bouncers walked around a bit, but stay close to the owner's table. He also testified, however, that the club consists of just one floor, and it is "a big open space with some alcoves."

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). On this motion, Au Bar has met its burden for the reasons that follow, but plaintiffs have failed to present disputed issues of fact for trial.

The owner of a public establishment has no duty to protect its patrons from unforeseeable and unexpected assaults nor to take any protective measures unless there was a foreseeable risk of harm from criminal activities of third persons on the premises. Rivera v. 21st Century Restaurant, Inc., 199 A.D.2d 14 (1st Dept 1993).

To support their claim that the bouncers should have anticipated the very kind of assault that took place against Mr. Lonskri, plaintiffs describe the noise levels in the club, cite the number of single, young people looking to "get their groove on" and make such pithy statements as "young people are, in general, more volatile and excitable, and upon provocation¹, exercise less cautious restraint." However, plaintiffs admit they did not seek help from the bouncers, or any one else associated with Au Bar, even though there were bouncers only 15 feet away. The affidavit of the private investigator fails to raise any genuine issue of fact as to the propriety of the security guards' actions at Au Bar. Although

¹The court presumes that plaintiffs did not really intend to admit they provoked the attack, and this is merely loose language.

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Messrs Roth and Digilov each separately allege that the attack they are accused of was foreseeable and it could have been prevented, these self serving claims are unavailing. There is no claim by either one of them that they sought out the bouncers to help them, or even that the incident did not occur as plaintiffs have alleged.

Au Bar has proved that it was not liable to plaintiffs for failing to prevent the assault because it had no duty to protect plaintiffs from the unforeseeable and unexpected assaults by other patrons. Naposki v. Au Bar, 271 AD2d 371 (1st Dept 2000). Plaintiffs have failed to raise any factual dispute that there was a foreseeable risk of harm from the criminal activities of third persons on the premises. Naposki v. Au Bar, supra.; Rivera v. 21st Century Restaurant, Inc; supra. Similarly, co-defendants Roth and Digilov has also failed to meet their burden in opposing Au Bar's motion. Therefore, defendant Very, Ltd. d/b/a Au Bar is entitled to summary judgment dismissing plaintiff's complaint against it as well as all claims against it by the co-defendants.

Since this action continues against Messrs Roth and Digilov, and the note of issue has been filed, the case is ready to be tried. Plaintiff shall serve a copy of this decision/order on the Clerk in Mediation-2, as well as on the Clerk in the Trial Support Office so that it may be scheduled for trial in due course.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied. This constitutes the decision and order of the court.

Dated: New York, New York
January 11, 2008

So Ordered:

Hon. Judith J. Gische, JSC

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