

<b>EI Gamal v Meilman Mgt. &amp; Dev. LLC</b>
2008 NY Slip Op 31136(U)
April 14, 2008
Supreme Court, New York County
Docket Number: 0117675/2005
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

*Justice*

PART 17

Index Number : 117675/2005  
 EL GAMAL, SAMMY  
 vs.  
 MEILMAN MANAGEMENT  
 SEQUENCE NUMBER : 001  
 DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this 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

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

**FILED**  
 APR 18 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 4/14/08

EMILY JANE GOODMAN <sup>J.S.C.</sup>

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 17

-----x  
SAMMY EL GAMAL,

Plaintiff,

-against-

Index No.: 117675/05

MEILMAN MANAGEMENT AND DEVELOPMENT  
LLC, G & P 418 CORP., JEDEMS INC.  
and PALENQUE INC.,

Defendants.

-----x

**EMILY JANE GOODMAN, J.S.C.:**

**FILED**  
APR 18 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action, Plaintiff claims he was assaulted in 2006 at approximately 2 am by an employee of an unspecified bar located in a building formerly owned and operated by Defendant Meilman Management and Development, LLC (Meilman). Meilman moves to dismiss this action against it on the basis that it is an out-of-possession landlord, owing no duty to Plaintiff. Meilman submits a very detailed affidavit indicating that it entered into leases with each of the three co-defendants, one of which allegedly operated the bar in question. The affidavit states that Meilman did not maintain a superintendent on the premises, but had an office on the second floor of the four story building for the limited purpose of collecting rent and performing certain repairs. The affidavit also states that because the office's hours were only 9am to 5pm, Meilman employees were not present when the incident occurred. The affidavit further provides that

Meilman never participated in the hiring, firing, training, education or management of any of its co-defendants' employees. Meilman submits copies of the three defendants' leases, providing for a right of re-entry for the purposes of making repairs, but also providing that each tenant indemnify Meilman for the actions of each tenants' employees, agents or servants.

In opposition, Plaintiff states that because Meilman had an office at the premises, an issue of fact exists as to whether Meilman is an out of possession landlord. Further, Plaintiff states that issues of fact exist as to whether Meilman owed a duty to Plaintiff because "if there was knowledge of past assaults at the premises, the Defendant MEILMAN would have a duty to provide for the safety of visitors" and, because no discovery has been conducted, dismissal is not appropriate.

#### Discussion

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in Alvarez v Prospect Hospital (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, the proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the

burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Following the guidance of the Court of Appeals, the lower courts uniformly scrutinize motions for summary judgment as well as the facts and circumstances of each case to determine whether relief may be granted. See Giandana v Providence Rest Nursing Home, 32 AD3d 126, 148 [1st Dept 2006][because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997][in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion"]. However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. Alvarez, supra, 68 NY2d at 324-325.

Neither side submits a definition of an "out-of-possession" landlord, which triggers the general rule that the landlord "is not liable to third parties injured on demised premises unless said lessor has retained control over or is contractually obligated to make repairs or maintain the premises [citations omitted]." Canela v Foodway Supermarket, 188 AD2d 416, 416 (1st Dept 1992). Although a landlord may not be considered "out-of-

possession" where that landlord retains office space (and control) in a building where an accident or incident occurred (see Kolmel-Hayes v South Shore Cruise Lines, Inc., 23 AD3d 530 [2d Dept 2005]; Massucci v Amoco Oil Co., 292 AD2d 351 [2d Dept 2002]), the relevant inquiry is not control of the area or space but rather "control of personnel" (see Smith v 2J Management Co., Inc., 211 AD2d 418 [1st Dept 1995][because landlord had nothing to do with the hiring and supervision of tenant's employees, who allegedly assaulted plaintiff at a bar in the pre-dawn hours, the complaint should have been dismissed despite the lack of discovery]). The affidavit submitted states that Meilman had nothing to do with the hiring and supervision of its co-defendants' employees and Plaintiff has submitted no proof to the contrary. Moreover, there is no evidence that Meilman was even present during the alleged assault. Plaintiff's statement that "if there was knowledge of past assaults at the premises, the Defendant MEILMAN would have a duty to provide for the safety of visitors" is not a basis to deny the motion as Plaintiff has supplied no evidence to even suggest that this might be the case. Accordingly, the motion must be granted (see also Regina v Broadway-Bronx Motel Co., 23 AD3d 255 [1st Dept 2005] [complaint seeking damages for an assault at a hotel dismissed against landlord]); Borelli v 1051 Realty Corp., 242 AD2d 516 [2d Dept 1997][complaint seeking damages for an assault at a bar dismissed

against landlord who did not operate the bar or hire or supervise the bar's employees]).

Accordingly, it is

ORDERED that the motion for summary judgment by Defendant Meilman Management and Development LLC seeking dismissal of the Verified Complaint as against it is hereby granted, and the Clerk of the Court is directed to sever that Defendant from the action and enter judgment in favor of it, without costs and disbursements; and it is further

ORDERED that the remainder of this action shall continue.

**This constitutes the Decision and Order of the court.**

Dated: April 14, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
APR 18 2008  
COUNTY CLERK'S OFFICE  
NEW YORK