

Schoneboom v B.B. King Blues Club

2009 NY Slip Op 30419(U)

February 23, 2009

Supreme Court, New York County

Docket Number: 115632/06

Judge: Marcy S. Friedman

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

PRESENT **Hon. Marcy S. Friedman**

PART 57

Index Number : 115632/2006
SCHONEBOOM, DAVID
VS.
B.B. KING BLUES CLUB
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 115632/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion ~~is~~ for summary judgment

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

PAPERS NUMBERED
1
2

Memos of Law M1, M2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined*
as per decision/order dated 2-23-09.

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

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2-23-09

[Signature]
Hon. Marcy S. Friedman

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

DAVID SCHONEBOOM and MELISSA
SCHONEBOOM,

Index No.:115632/06

Plaintiff(s),

DECISION/ORDER

- against -

B.B. KING BLUES CLUB,

Defendant(s).

_____ x

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiff David Schoneboom sues defendant TSE Group for personal injuries allegedly sustained on August 3, 2006, when he was struck on his left knee during a heavy metal rock concert at B.B. King Blues Club located at 237 West 42nd Street in Manhattan. Defendant TSE Group, LLC d/b/a B.B. King Blues Club & Grill (“B.B. King”) moves for summary judgment dismissing the complaint on the ground, among others, that plaintiff assumed the risk of injury.

Plaintiff, a concertgoer at B.B. King, testified at his deposition that he arrived at B.B. King at approximately 8:00 p.m. on August 3, 2006, where he met friends. (P.’s Dep. at 37-38.) He testified that he was with friends on the upper level of the club when the heavy metal rock group, Kill Your Idols, went on the stage, and that he left his group and went down to the lower level of the club to get a better view. (Id. at 49-50.) At the lower level, plaintiff witnessed, but did not participate in, a form of dancing called “slam dancing,” a “form of moshing” which

consists of “[a] lot of people bouncing around, bouncing off each other. A lot of people having a good time.” (Id. at 55-57.) After Kill Your Idols finished their set, plaintiff went back to the upper level of B.B. King to join his group, while the next band, Sub Zero, began to play music. (Id. at 57.) At this time, plaintiff observed a smaller crowd of individuals participating in what he described as similar to the slam dancing that had been going on earlier, “yet it seemed quite a bit more malicious.” (Id. at 61.) Plaintiff further testified: “I was intending on going down, but I witnessed this group taking potshots at perimeter people, people just watching the show. They were throwing themselves into these same people that were not participating in the slam dancing. I saw several elbows thrown.” (Id. at 62.) When the next band, the Crumb Suckers, was announced, plaintiff immediately went downstairs to watch the show, and stood approximately 10 to 12 feet from the stage, facing the stage. (Id. at 69-70.) The room was then crowded (id. at 71), and people were moshing behind him. (Id. at 75.) Plaintiff himself was not participating in the moshing. (Id. at 72.) About five to seven minutes into the Crumb Suckers performance, plaintiff felt a shove from behind into the side of his knee which felt like a kick, but did not see the person who kicked him. (Id. at 72-73.) The injury resulted in a torn ACL ligament and meniscus damage, which required surgery. (Id. at 94-96.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing

[* 4]

party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b].")
(Zuckerman, 49 NY2d at 562.)

It is further settled that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." (Green v City of New York, 263 AD2d 385 [1st Dept 1999]; citing Morgan v State of New York, 90 NY2d 471, 484 [1997].) Under the doctrine of primary assumption of risk, the defendant's duty "is a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty." (Turcotte v Fell, 68 NY2d 432, 439 [1986].) The doctrine covers many different categories of sports and recreational activities, involving spectators as well as participants. (See e.g. Nelson v Café Wienecke, Inc. 18 AD2d 392 [1st Dept 1963] [samba dancer assumed the risk of falling while dancing]; Cuesta v Immaculate Conception Roman Catholic Church, 168 AD2d 411 [2d Dept 1990] [umpire assumed the risk of being struck by baseball]; LaFond v. Star Time Dance & Arts Center, 279 AD2d 509 [2d Dept 1990] [tap dancer assumed the risk of falling while dancing]; Powell v Metropolitan Entertainment Co., Inc., 195 Misc2d 847 [3d Dept 2003] [plaintiff attending rock and roll concert assumed risk of hearing impairment from loud music]. See also Murphy v. Steeplechase Amusement Co., Inc., 250 NY 479 [1929] [plaintiff accepted risk of injury from obviously dangerous amusement park ride].)

On the undisputed facts, plaintiff, an experienced concertgoer, assumed the risk of being struck by a fellow concertgoer when, although conscious that an aggressive type of moshing was in progress, he deliberately placed himself in proximity to it. As discussed above, before going

[* 5]

down to the stage to watch the band during whose performance he was injured, plaintiff knew that there was mosh dancing near the stage and, indeed, during the prior performance, had seen mosh dancing that he described as “malicious.” He nevertheless went down to watch the next band and stood at the front of the stage, in the vicinity of the mosh dancing. Moreover, plaintiff was 36 years old at the time of the incident (P.’s Dep. at 8), and had attended more than one hundred concerts and himself participated in mosh dancing thirty to forty times over the years. (Id. at 63-65.)

“[T]he determination of the existence of a duty and the concomitant scope of that duty involve a consideration not only of the wrongfulness of the defendant’s action or inaction, they also necessitate an examination of plaintiff’s reasonable expectations of the care owed him by others. . . . If a participant makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks.” (Turcotte v Fell, 68 NY2d at 437.) Here, plaintiff not only elected to assume the risk of concert-going in a mosh dancing venue but was in the position, given his experience, to fully appreciate the risk.

In so holding, the court rejects plaintiff’s contention that he did not consent to the risk because he did not actually participate in the mosh dancing. It is well settled that “a spectator generally will be held to have assumed the risks inherent in the game, including the specific risk of being struck.” (Sutfin v. Scheuer, 145 AD2d 946 [1st Dept 1988], affd 74 N.Y.2d 697 [1989].)

The court also rejects plaintiff’s contention that plaintiff did not assume the risk of an assault or that a triable issue of fact exists as to whether plaintiff was assaulted. On this record, there is no evidence that plaintiff’s injury was the result of an intentional assault rather than of a

physical contact with a mosh dancer in the vicinity. There were no witnesses to the incident, and a jury could only speculate that an assault occurred.

Further, while plaintiff testified that the moshing during the prior band's performance was more malicious than usual, and now submits affidavits from his friends asserting that a small group was engaged during the prior performance in "assaultive behavior . . . far beyond the bounds" of moshing (see Romanski Aff. In Opp., ¶ 3), plaintiff and his friends do not claim that they made any complaint to security about such behavior. In any event, even assuming arguendo that defendant had a duty to impose reasonable security measures to minimize danger, there is no evidence that defendant breached such duty. (See Djurkovic v Three Goodfellows, Inc., 1 AD3d 210 [1st Dept 2003]; Stafford v 6 Crannel St., Inc., 304 AD2d 997 [1st Dept 2003].) It is undisputed that there were nine or ten security guards on the floor at the time of the incident. (Dep. of Gerard Merson [D.'s employee] at 48.) Plaintiff fails to make any showing that the security measures were defective or that additional security measures could reasonably have been taken to prevent the incident. (See Djurkovic v Three Goodfellows, Inc., 1 AD3d at 211; Stafford, 304 AD2d at 999.)

The complaint should therefore be dismissed. In view of this holding, the court does not reach the branch of defendant's motion for indemnification.

It is accordingly hereby ORDERED that defendant's motion is granted to the extent of dismissing the complaint; and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
February 23, 2009

Marcy Friedman
MARCY FRIEDMAN, J.S.C.
FILED
FEB 26 2009
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