

Leconte v LVMH Moet Hennessy Louis Vuitton, Inc.
2009 NY Slip Op 31166(U)
May 22, 2009
Supreme Court, New York County
Docket Number: 118284-06
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 118284/2006

LECONTE, RAYNALD

VS.

LVMH MOET HENNESSY

SEQUENCE NUMBER : 002

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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 22 2009

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Raynald Leconte,

Plaintiff (s),

-against-

LVMH Moet Hennessy Louis Vuitton, Inc.,
Louis Vuitton North America, Inc.,
as a subsidiary of
LVMH Moet Hennessy Louis Vuitton, Inc.,
GSS Security Services, Inc., and
Lincoln Center for the Performing Arts, Inc.,

Defendant (s).

DECISION/ ORDER
Index No.: 118284-06
Seq. No.: 002, 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

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

Papers	Numbered
	MOTION SEQ 002
Defs' LV/LCPA n/m (3212) w/HS affirm, exhs	1
Pltf RL opp w/JKF affirm, exhs	2
Defs' LV/LCPA reply w/HS affirm, exhs	3
	MOTION SEQ 003
Def GSS n/m (3212) w/RCP affirm, exhs	4
Pltf RL opp w/JKF affirm, exhs	5
Def GSS reply w/RCP affirm	6
Transcript 3/26/09 (OA- both motions)	7

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Raynald Leconte ("plaintiff") while attending an event held at Lincoln Center. Defendants are the sponsor ("Louis Vuitton") of the after party or event held at Lincoln Center, the owner of Lincoln Center ("LCPA"), and GSS Security Services, Inc., a security company that Louis Vuitton hired for the event ("GSS"). Issue was joined by the moving

defendants. The note of issue was filed. The court has before it a timely motion by Louis Vuitton and LCPA (sometimes "LV/LCPA") for summary judgment dismissing plaintiff's complaint. LV/LCPA has also moved for the dismissal of GSS's cross claims against them. GSS has separately moved for summary judgment dismissing plaintiff's complaint. It also seeks permission to serve an amended complaint to assert a claim for contractual indemnification against Louis Vuitton and summary judgment on that claim. GSS has, however, (in its reply) withdrawn that portion of its motion seeking relief on its cross claims against Louis Vuitton and LCPA. Plaintiff opposes both motions for summary judgment on the basis that there are factual issues to be tried. Since the motions before the court are timely, they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The court's decision and order is as follows:

Arguments presented

Plaintiff contends that he was physically assaulted at an event held at Lincoln Center (Damrosch Park) by non-party Jeremy Bergstein ("Bergstein"), a fellow event attendee. Bergstein hit plaintiff on the face with a glass that shattered and cut him.

Plaintiff has asserted common-law negligence claims against the defendants, based upon their alleged failure to provide adequate security. He also claims they violated General Obligations Law section 11-101, more informally known as the "dram shop act." The dram shop act allows an injured party to be compensated for injuries caused by the illegal sale of alcohol to any intoxicated person. GOL § 11-101 (1).

Plaintiff was deposed ("EBT"). He testified at his EBT that he was invited to an event commemorating the opening of a new Louis Vuitton store and its 150th anniversary.

The event, sponsored by Louis Vuitton, was held at Lincoln Center within a tented area. The event began on February 10, 2004 at 10:00 p.m. and lasted into the next day (February 11th). There were approximately 2,000 guests.

After drinking some champagne, plaintiff went to stand on line for the men's room. The line was long, chaotic, and the tented area was noisy because loud music was playing. While in conversation with someone else on line (James Duran) ("Duran"), Bergstein turned around and said to plaintiff "I don't like you." According to plaintiff, Bergstein looked "pissed off" and "drunk." Bergstein then pushed and shoved plaintiff several times and the two exchanged words. Although he did not notice Bergstein holding anything in his hands, he soon felt Bergstein pour something on him, like a drink. After this happened, the two men exchanged some more words and Bergstein smashed him on the face with a glass that broke. When asked how long this whole course of events lasted - from first seeing Bergstein on line to being cut - plaintiff estimated it was only minutes: "I would say five minutes, four minutes" maybe "a little over five minutes."

Plaintiff testified at his EBT that he noticed a lot of security when he arrived at the event and he attributed this to post "9/11" jitters. The security persons he saw were checking people in. He also saw "NYPD" (officers in uniforms) carrying machine guns. According to plaintiff, he noticed people dressed in business suits wearing earpieces. He also noticed other people wearing security type uniforms. None of these persons, however, were near the men's room area. Plaintiff testified that while he was in line, he did not notice any security personnel, police, etc., in that area, nor did he make any attempt to seek help once he noticed that Bergstein was starting to engage him.

Following his attack, security personnel came over to help him as did police

officers. This apparently happened within minutes, but plaintiff could not remember exactly how long.

Duran, a witness, and the person plaintiff was talking to while on line, was also deposed. Duran testified that when he arrived at the event, he noticed security personnel at the entrance. He described these people as wearing black suits and headsets. According to Duran the entire incident between Bergstein and plaintiff took no more than two to four minutes. Duran testified that Bergstein "seemed a little drunk" because his eyes were droopy and he was slurring his words. Duran did not recall seeing any security officers (uniformed or otherwise) near the men's room, nor did he make any attempt to seek help when the pushing began. He testified that everything happened very quickly.

Sandra Marinello, was the director of Special Events for LVMH when the event took place; she was also deposed. Marinello testified at her EBT that LCPA was supposed to provide "external security" at Lincoln Center. She was asked questions about Louis Vuitton's contact with GSS for security at the event. The contract, dated January 15, 2004, was for the period January 23, 2004 through February 14, 2004 ("security contract") and it is a part of the record on these motions.

The security contract called for GSS to undertake several tasks, including getting permits for the event and securing "the temporary no parking area." Germane to this dispute, however, is the requirement that GSS provide "Special Event Security Officers and Supervisor to assist with guest access control during [the] event at location #2 [from] 7:00 p.m. [on] 2/10/04 [to] 2:00 a.m. [on] 2/11/04." "Location #2" refers to the tented event at Lincoln Center- Damrosch Park. The contract called for the assignment of twenty-two (22) officers at the event and three (3) supervisors.

Marinello testified that there were tables inside the tent and people were dancing. She was present during the event to make sure things went smoothly. She did not observe the assault, however, nor notice any kind of disturbance before it happened. She received no complaints. Alcohol was served at the event as was food. The alcohol was served at two bars and also by waiters who carried trays. The rest rooms were inside the tent, near the entrance.

Charles Garelick, the managing director of GSS, was also deposed and asked questions about security at the event. He testified that GSS security officers were stationed at the perimeter of the event, near the admitting area, checking names against lists of invited guests. These people also monitored the exits and the back stage area, as well as the press area where celebrities would be photographed by the paparazzi. At times GSS had security officers patrolling inside the tented area. GSS security officers did not wear security uniforms. They only wore small badges on their suit lapels and wore headsets. They did not have two way radios.

Louis Vuitton and LCPA argue that they did not have a duty to plaintiff, and therefore were not negligent. Alternatively, they argue even if they did have a duty which they breached, such negligence was not the proximate cause of plaintiff's injuries. They contend that the altercation was very brief (only lasting five minutes) and sudden. They argue that what transpired was unforeseeable and Bergstein's attack on plaintiff was a superceding intervening criminal act, which cut off any causal nexus between their alleged negligence and plaintiff's injuries. They argued no one notified security or anyone else in charge that there was a problem on the men's room line, and therefore, Bergstein's act could not have been anticipated, nor stopped.

The defendants argue that the dram shop act is inapplicable to the facts of this case (assuming plaintiff can prove her facts at trial) because alcohol was not sold to the guests, but served gratis as part of the event.

GSS seeks summary judgment for many of the same reasons. It supports LV/LCPA's arguments about the dram shop act, as well as arguments that no duty was owed to plaintiff. GSS separately argues, however, that plaintiff was not an intended third party beneficiary of the security contract, not only because of the language in the contract, but also because of the circumstances involved in this assault. The applicable provision in the security contract is as follows (Section 7 [B]):

"[t]he services provided under the Confirmation Letter are solely for the benefit of the client and neither the Agreement nor any services rendered by GSS hereunder shall give rise to, or shall be deemed or construed so as to confer, any rights on any person or entity as a third party beneficiary."

Plaintiff opposes each summary judgment motion on the basis that there are triable issues of fact, including whether GSS exercised reasonable care in the performance of its duties. He argues that GSS was required to provide guest access control, but failed to do so. Plaintiff also contends that even if plaintiff was not an intended third party beneficiary of the security contract GSS entered into with Louis Vuitton, GSS induced his reliance upon GSS's security because they were visibly present.

Plaintiff argues that Bergstein's criminal act does not cut off any of the defendants' liability because they should have anticipated a risk of harm from criminal activity to persons on the premises, and they were on notice that Bergstein was agitated and acting up.

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). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

The dram shop act requires that the owner of a bar, etc. "adequately supervise and control the patrons consuming alcoholic beverages within the area where supervision and control might reasonably be exercised . . ." Lippman v. Hines, 138 A.D.2d 845, 846 (3rd Dept 1988). Assuming that plaintiff can prove Bergstein was intoxicated when the incident occurred, and even assuming plaintiff can prove Bergstein had drinks at the Louis Vuitton event, there is no triable issue of fact that defendants did not "sell" alcohol to him, within the meaning of GOL 11-101.

Liability attaches under the dram shop act only if there has been an unlawful "sale of alcohol." Carr v. Kaifler, 195 A.D.2d 584 (2nd Dept 1993). The act, however, does not define what a sale of alcohol is, or what it means to "sell" alcohol. The dram shop act, however, is an exception to that common law. Under common law, a defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter the defendant can exercise such control. D'Amico v. Christie, 71 N.Y.2d 76, 88 (1987). The dram shop act, however,

imposes a statutory duty on the seller of alcohol to protect plaintiff from the conduct of others. Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 232 (2001). Thus, the statute must be narrowly construed. D'Amico v. Christie, 71 N.Y.2d at 83.

An essential element of an action under the dram shop act is that defendant sold alcohol to a visibly intoxicated person. "Where there is no commercial sale of alcohol for profit, there can be no cause of action under the Dram Shop Act." see, D'Amico v. Christie, 71 N.Y.2d at 84; Stevens v. Spec Inc., 224 A.D.2d 811, 813 (3rd Dept 1996).

The court has considered plaintiff's argument, that because the event was part of Louis Vuitton's marketing plan, there was a profit motive, and therefore a "sale" within the meaning of the dram shop act. The argument, however, fails. Damages caused by illegal sale of alcoholic beverages are regulated by General Obligations Law § 11-101 (the dram shop act). However, recovery of damages requires an "illegal sale" of liquor to an intoxicated person within the meaning of section 65 of the Alcoholic Beverages Law, which imposes criminal liability on a defendant. G.O.L § 11-101; Alcoholic Beverages § 65; Moyer v. Lo Jim Café, Inc. 19 A.D.2d 523 *affirmed* 14 N.Y.2d 792 (1964). Cases have construed "sale" or "sell" to require an actual, hand to hand, exchange of money. D'Amico v. Christie; *supra*; Custen v. Salty Dog, Inc., 170 A.D.2d 572 (2nd Dept 1991). Here, the alcohol was served at no charge. Joly v. Northway Motor Car Corp., 132 A.D.2d 790 (3rd Dept 1987). Therefore, the claims under the dram shop act must be dismissed because the statute is inapplicable to the facts of this case.

The court next considers whether plaintiff has a claim against the defendants for negligence under the common law. Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property (Basso v. Miller, 40 N.Y.2d

233 [1976]) and a landowner may be liable for injuries caused by an intoxicated guest (Joly v. Northway Motor Car Corp., supra). Liability, however, will only attach if the defendant had the opportunity to supervise the intoxicated guest. D'Amico v. Christie, 71 NY2d at 85. Thus, although the landowner must use reasonable care to protect persons at the premises from injury arising from reasonably anticipated causes, there is no duty to protect against an occurrence that is extraordinary in nature and the landowner could not have reasonably anticipated. Id; Custen v. Salty Dog, supra.

Here, even assuming plaintiff can prove at trial that the Louis Vuitton and LCPA were negligent, his injuries (lacerations, etc.) were due to Bergstein's independent, intervening criminal act. Maheshwari v. City of New York, 2 N.Y.3d 288 (2004). Neither Louis Vuitton nor LCPA were insurers of plaintiff's safety at the event. Although plaintiff raises an issue about whether Bergstein actions were foreseeable, "foreseeability" does not determine whether there is a duty, but the scope of the duty, once the duty is established. Maheshwari v. City of New York, supra.

Louis Vuitton and LCPA took reasonable steps to insure crowd control and make sure only invited guests were admitted into the event. Bergstein was not an intruder, but an invited guest who committed a random attack. Plaintiff has not raised triable issues of fact that the attack was a normal or foreseeable consequence of a situation the defendants created. Maheshwari v. City of New York, supra. Since neither Louis Vuitton nor LCPA owed a duty to plaintiff, neither of these defendants was negligent. Defendants have proved their entitlement to summary judgment, there are no issues of fact, therefore the the negligence claims against Louis and LCPA must be dismissed.

GSS's service contract was with Louis Vuitton. Plaintiff is not the third party

beneficiary of that contract, but he argues that he noticed security personnel when he arrived at the event and therefore, expected it to be a relatively safe environment. To establish a *prima facie* claim as a third party beneficiary, the following elements must be present: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [plaintiff's] benefit and (3) that the benefit to [plaintiff] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [plaintiff] if the benefit is lost." State of California Public Employees' Retirement System v. Sherman & Sterling, 95 NY2d 427, 435 (2000); Edge Management Consulting, Inc. v. Blank, 25 AD3d 364 (1st Dept 2006). These conditions are not met by plaintiff's facts or the circumstances of this case.

The service agreement that Louis Vuitton had with GSS was to make sure invited guests had access to the event, to keep out the public (i.e. persons not invited), and crowd control. Thus the benefit was to the property owner who has to maintain a safe premises. At best, plaintiff is an incidental beneficiary of the service agreement, but not a third party beneficiary.

The court has considered further arguments by plaintiff, that he detrimentally relied upon the presence of security officers. Espinal v. Melville Snow Contractors, Inc., *supra*. Not only was GSS present, there was also NYPD and other security. Defendants have established their defense (i.e. plaintiff is not a third party beneficiary of the GSS security contract), but plaintiff has not raised triable issues of fact to defeat GSS's motion. Therefore, GSS's motion, for summary judgment in its favor is also granted.

Having dismissed plaintiff's complaint, the cross claims asserted among the defendants are also dismissed because they arise from the same dispute and are now

moot. The dismissal of those cross claims is, however, without prejudice.

Conclusion

The motion by LV/LCPA is hereby granted and they are granted summary judgment against the plaintiff dismissing the complaint. GSS's motion for summary judgment dismissing the complaint against it is granted as well. The cross claims among the defendants are hereby severed. In accordance with the foregoing,

IT IS HEREBY

ORDERED that the Clerk shall enter judgment in favor of defendants LVMH Moet Hennessy Louis Vuitton, Inc., Louis Vuitton North America, Inc., *as a subsidiary of* LVMH Moet Hennessy Louis Vuitton, Inc., GSS Security Services, Inc., and Lincoln Center for the Performing Arts, Inc., against plaintiff Raynald Leconte dismissing the complaint; and it is further

ORDERED that the cross claims asserted among the defendants are also dismissed since they arise from the same dispute and are moot; the dismissal of those cross claims is, however, without prejudice; and It is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, York
May 22, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.

FILED
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NEW YORK