

**Villa v Paradise Theater Prods., Inc.**

2009 NY Slip Op 32516(U)

October 27, 2009

Supreme Court, New York County

Docket Number: 115710-2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHF

PART 10

Index Number : 115710/2006

**VILLA, GUILLERMO**

vs.

**PARADISE THEATER PRODUCTIONS**

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

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

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

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

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

this motion to/for 83212

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**  
OCT 29 2009

OCT 27 2009

Dated: \_\_\_\_\_

\_\_\_\_\_  
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: PART 10**

-----x  
Guillermo Villa,

Plaintiff (s),

-against-

Paradise Theater Productions, Inc., and  
Emmis Communications Corporation,

Defendant (s).  
-----x

DECISION/ORDER  
Index No.: 115710-2006  
Seq. No.: 002, 003

**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):*

<b>Papers</b>	<b>Numbered</b>
<b><u>Seq. 002</u></b>	
Def Paradise n/m (CPLR 3212) w/CLC affirm, exhs .....	1
Pltf's opp w/ELL affirm, DHG affid (original and copy), exhs .....	2,3
Def Paradise reply w/CLC affirm .....	4
Supplemental reply w/CLC affirm .....	5
<b><u>Seq.003</u></b>	
Def Emmis n/m (CPLR 3212) w/LAF affirm, exhs .....	6
Pltf's opp w/ELL affirm, DHG affid (original and copy), exhs .....	7,8
Def Paradise partial opp w/CLC affirm .....	9
Def Emmis reply w/LAF affirm .....	10

**FILED**  
OCT 29 2009  
COUNTY OF NEW YORK

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

Plaintiff seeks damages for personal injuries he sustained while at a performance that took place at the Paradise Theater, located in the Bronx. Issue has been joined and the note of issue was filed by the plaintiff on February 13, 2009. The court has before it timely motions by each of the defendants ("Paradise" and "Emmis") for summary judgment dismissing plaintiff's complaint against each of them and also

dismissing each of their cross claims against one another. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The motions are consolidated for consideration and disposition in a single decision and order, which is as follows:

### **Arguments**

Plaintiff claims that on the morning of November 26, 2005, he was slashed on the face with a box cutter wielded by someone in the "VIP" area of the Paradise Theater. He contends that the defendants had a duty of care to him and that the assault was foreseeable because the event was a rap/ hip-hop concert and those kinds of events are known within the security industry to be associated with violent occurrences. Plaintiff alleges that defendants breached their duty of care by failing to provide adequate security. This theory of liability is principally supported by the sworn affidavit of Donald H. Greene ("Greene") who is a security consultant.

Paradise is the owner of the Paradise Theater and Gabriel Boter ("Boter"), is the principal of Paradise. Emmis is the owner of "Hot 97," the New York City radio that promoted the event and aired live performances by various rappers on its station.

Paradise seeks summary judgment on the basis that the criminal act of plaintiff's assailant was unforeseeable and unexpected and that the owner could not anticipate every action by a third party. Paradise argues further that it undertook security measures that were reasonable under the circumstances, including hiring a private security company (non-party Fisco) ("Fisco")<sup>1</sup>.

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<sup>1</sup>Plaintiff has commenced a separate action against Fisco which apparently does business as Dolphin Security (Villa v. Patty Fisco, LTG Security, Front Line Security, Dolphin Protective Services, Index No. 115382-08). Fisco has not answered the complaint in that action or otherwise appeared. There is a separate motion for entry of a default judgment in that case.

Emmis separately moves for summary judgment dismissing plaintiff's complaint and Paradise's cross claims. Emmis argues that Paradise had the sole responsibility for security at the event and the owner hired Fisco to provide security. Emmis contends its duties were strictly limited to publicizing the concert, selling advertising time during the performance and broadcasting it. Although Paradise adopts Emmis' arguments insofar as the radio station seeks the dismissal of the complaint, Paradise opposes Emmis' motion for the dismissal of Paradise's cross claims, on the basis that Emmis' was responsible for the security at the event. Both defendants urge the court to disregard the affidavit of plaintiff's proposed expert because he was not disclosed before these motions were brought or the Note of Issue was filed. Alternatively, the defendants argue his expertise does not relate to performance venues, but commercial malls and, in any event, his opinion is conclusory, without any factual basis.

Plaintiff was deposed. So was Boter, non-party Fisco and Donyshia Benjamin ("Benjamin"), Emmis' Senior Promotions Director in November 2005. Perez was not deposed, but has provided his sworn affidavit in support of Emmis' motion for summary judgment.

Plaintiff alleges, and testified at his examination before trial ("EBT"), that when he arrived at the Paradise Theater he entered through main entrance which was on the Grand Concourse. There were two lines to enter the theater, each going through metal detectors. Plaintiff's was wearing boots reinforced with steel and they set the metal detector off. Once on the other side of the detector, he was instructed to remove them so they could be separately "wanded." Plaintiff testified that he observed security guards "wanding" people regardless of whether they set off the metal detectors or not

and after being "wanded," people were required to check in their coats before they could enter the theater. According to plaintiff, security was "tight" that night. He also testified, however, that although the theater was packed, the crowd was "relaxed . . . and every one was getting along." He could not recall seeing any physical altercations prior to the incident involving him.

Plaintiff went up to the balcony area where he was invited into the VIP lounge by one of the rappers he knew. The area was cordoned off with a velvet rope and protected by two men in black uniforms. After 15 minutes of mingling and talking to females, the rapper who had invited him (and whose name he could not recall) told him he had to leave. According to plaintiff, he and the rapper had words, the rapper then told his entourage to get plaintiff out, and as plaintiff started to move away, someone from the entourage slashed him on the cheek with a box cutter. As this happened the security men were "within arms length facing the [assailant]." Plaintiff testified he did not yell or scream or ask anyone for help, but believing something worse might happen to him, plaintiff fled the theater and got a cab to go to the hospital where he received stitches on the face.

Fisco testified at his EBT that he had worked on other Hot 97 events in the past and when Perez contacted him about the concert at the Paradise, he followed up on the suggestion that he call a "lady" at the Paradise Theater to discuss the possibility of working the event. Fisco met with Boter's son and did a walk through of the theater to see what kind of security was needed. Fisco prepared a proposal for Boter on behalf of non-party Dolphin Security, one of the companies Fisco either works for or owns.

Boter told Fisco his price was too high and asked whether Fisco could do the job

for less and be covered under Paradise's insurance rather than Dolphin's. Fisco agreed and he was paid \$3,000 for services pursuant to an oral agreement. Fisco could not recall how many security person he provided that night, but recalled there were fewer than he had initially proposed in writing. It was possibly 20 or 30 people but not more than 50. According to Fisco, there were "a ton of police outside [the theater]."

Although Fisco could not recall whether there were stationary magnetometers outside the theater, his security personnel had handheld metal detectors or "wands" with fresh batteries in them. According to Fisco, every concert goer, every performer, and each member of a performer's entourage was wanded and then physically patted down to check for concealed weapons. Everyone was also instructed to remove their shoes so they could be checked.

According to Fisco there were 4 or 5 security people directing the crowd and 4 searchers at the door patting people down. Three (3) or 4 security people were in the coat check area, some security people were in the theater and there was a security person at the bottom of the stairs to the VIP lounge. Two (2) security persons were at the top of lounge area; one on each side of the DJ booth.

Fisco testified that although he was not instructed to secure one or two back entrances to the Paradise leading to a fire escape, Boter had his own "people" there. According to Fisco, all the performers, etc., came in through the front entrance, after his security detail was in place. There were some people in the theater before Fisco arrived, but they worked for Paradise and they were setting up, putting up banner, etc.

Although there were 2 or 3 incidents that night requiring intervention by Fisco's security staff, there was no significant physical altercations until it came time for people

to retrieve their coats. The lines started out orderly, but the crowd subsequently became impatient and got unruly. The police did not, however, intervene although Fisco asked them to help.

Boter testified at his EBT that he did not have a written contract with Emmis for the event, but their agreement entailed Paradise paying for the performers and DJs and buying radio advertising time promoting the event. Paradise also supplied bartenders, wait staff and ticket takers.

Although Boter testified at his EBT that he met with and paid for Fisco's services, he denied hiring Fisco directly, but testified that it was Perez who hired the security force. Paradise now acknowledges in this motion that it was Boter who hired Fisco and then paid for his services. Boter testified at his EBT that he gave Fisco instructions about what he expected and wanted in terms of security at the Paradise Theater. Boter testified that there were 25-30 security guards at the event and as many police officers present, some uniformed, some in plain clothes. Paradise owned and used two metal detectors. Attendees and the performers had to walk through the metal detectors to gain access to the building. Boter was present the evening of the incident and he personally observed security personnel using wands to check for concealed weapons. Boter also had two of his construction workers present, just as additional "eyes and ears" and to address any problems that might arise with equipment, etc. According to Boter, security was so strict that drinks were only served in plastic cups - there were no bottles allowed.

Perez's sworn affidavit is that he suggested some security companies to Paradise once it was agreed that Paradise would host the event, but Paradise was free

to chose any one of those companies or none of them. Perez reported directly to Benjamin, Emmis' Senior Promotions Director, who was deposed. Benjamin testified at her deposition that Perez was responsible for the event, in the sense that he attended to event related tasks like selling air time, making sure there was signage and arranging for the equipment and staff needed for the live broadcast to be present on the day of the event. Emmis, however, did not hire, nor was responsible for hiring, the security staff. Benjamin also testified that the staff present for the event were responsible for the production, not security side, of the event.

In opposition to both motions, plaintiff argues that there are factual disputes that have to be tried. He contends that there was inadequate security, people may have gained access to the theater through the back entrances, and the weapon would have been discovered had it been brought through one of the metal detectors. His expert opines that defendants deviated from "reasonable and customary practices," without articulating what those practices are.

### **Applicable Law**

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).

## Discussion

An owner or possessor of land has a common-law duty to maintain the public areas of the property in a reasonably safe condition for those who use it. Nallan v. Helmsley-Spear, Inc., 50 NY2d 507, 519 (1998); Basso v. Miller, 40 NY2d 233, 241 (1976). This duty includes the obligation to maintain minimal security precautions to protect users of the premises against injury caused by the reasonably foreseeable criminal acts of third persons. Nallan v. Helmsley-Spear, Inc., 50 NY2d at 519.

Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists. Maheshwari v. City of New York, 2 NY3d 288 (2004); Tagle v. Jakob, 97 N.Y.2d 165, 168 (2001). The scope of the possessor's duty is defined by past experience and the "likelihood of conduct on the part of third persons ... which is likely to endanger the safety of the visitor." Maheshwari v. City of New York, 2 NY3d at 294 (internal citations omitted). The possessor of land has no duty to protect persons against unforeseeable and unexpected assaults, unless there was a foreseeable risk of harm from criminal activities of third persons on the premises. Camacho v. Edelman, 176 A.D.2d 453, 454 (1<sup>st</sup> Dept 1991).

As the owner of the facility where the concert was held, Paradise had a duty to undertake reasonable security measures to protect people attending the concert. Maheshwari v. City of New York, *supra.*; Nallan v. Helmsley-Spear, Inc., *supra.* Paradise was not, however, the insurer of plaintiff's safety.

Paradise has established that it hired a private security company for the event and that it notified the New York Police Department that a concert was being held at the

theater on November 25, 2005. There were a number of security personnel in identifiable black uniforms. There were uniformed and plain clothed police present that evening as well. Paradise owned and used metal detectors at the entrance. Security wanded people coming into the theater and required that they check in their coats. The security staff did pat downs to check for concealed weapons. There was also a security presence inside the theater and leading up to the VIP lounge where plaintiff claims he was attacked. Defendants have established that they not only provided security, but have presented a prima facie case that it was more than just minimal security. The possessor of land does not have to provide the optimal most advanced security system available. Florman v. City of New York, 293 A.D.2d 120 (1<sup>st</sup> Dept 2002).

Paradise has also established that the attack on plaintiff was an extraordinary, unanticipated and unexpected act. To withstand summary judgment, plaintiff must raise an issue of fact that the attack on plaintiff was foreseeable. McKinnon v. Bell Security, 268 AD2d 230 (1<sup>st</sup> Dept 2000) (*citing Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 316 [1980]). Plaintiff claims that had there been proper security at the Paradise Theater, he would not have been assaulted and the fact that the box cutter made its way into the theater is evidence that defendants were negligent. This argument is echoed by Greene in his sworn affidavit.

Greene, plaintiff's proposed expert, was not disclosed before plaintiff filed his note of issue. Mauro v. Rosedale Enterprises, 60 AD3d 401 (1<sup>st</sup> Dept 2009). Nevertheless, leaving that issue aside, Greene's affidavit presents statements not based upon any facts in this record and are offered without any support. Some of his observations have nothing to do at all with the type of incident alleged. For example,

Green opines that the defendants should have done a background check to see what kind of entertainers were going to be performing that night. Other statements by him are that "rap/ hip hop events are known in the security industry to be associated with violent occurrences and . . . heightened security is required at these events . . ." This is offered without any explanation or what "standard" he is referring to that the defendants did not adhere to. Amaya v. Denihan Ownership Corp., LLC, 30 AD3d 327 (1<sup>st</sup> Dept 2006). Although the possessor of land must provide reasonable security measures, it need not provide optimal or the most advanced security system available. Florman v. City of New York, supra. Furthermore, the mere fact that an accident occurs does not mean that a defendant is liable unless the plaintiff can show how the defendant's breach of some duty caused or contributed to the plaintiff's mishap. Braithwaite v. Equitable Life Assur. Soc. of U.S., 232 A.D.2d 352 (2<sup>nd</sup> Dept 1996). Neither plaintiff nor his expert raise issues of fact about whether Paradise failed to take reasonable security measures.

Claims by plaintiff, that prior incidents occurring earlier in the evening, before his attack, are evidence that there was inadequate security, are ineffective against Paradise's motion and do not raise triable issues of fact. The 2 or 3 incidents that evening did not involve a weapon, they did not escalate, and they apparently involved people who were together or knew each other. None of the incidents involved plaintiff and none of the incidents escalated out of control, but were quickly quelled. There is, therefore, no issue of fact raised by plaintiff that there was a likelihood of conduct on the part of third persons which endangered him. Maheshwari v. City of New York, 2 NY3d at 294. Paradise was not an insurer of plaintiff's safety while on the premises.

Williams v. Citibank, N.A., 247 A.D.2d 49 (1<sup>st</sup> Dept 1998).

Although it is unrefuted that Perez recommended Fisco to Paradise as one of the security companies for the event, Emmis has proved that it had no contractual obligation to provide Paradise with security at the concert, nor did it assume that obligation. Once Perez suggested Fisco, it was up to Paradise to decide who to hire and make the needed arrangements. Despite Boter's initial EBT testimony, that Perez hired Fisco, Paradise has retreated from that statement and admits in its motion that it was Boter who hired the security force. In any event, this is firmly supported by the evidence that Emmis submitted in support of its motion. Emmis has established that it was Boter (and his son) who met with Fisco. Boter and Fisco discussed the pricing for Fisco's services and it was Boter who hired and paid Fisco his fee. Emmis has proved that its obligations to Paradise were limited to advertising, promoting, and broadcasting the performances held at the Paradise Theater the evening of the incident. Since there was no contract between Emmis and Paradise for Emmis to provide security at the event, Emmis was not responsible (nor did it undertake any responsibility) for security. Thus, it did not owe a duty to plaintiff as to his safety or security. 981 Third Avenue Corp. v. Beltramini, 108 A.D.2d 667, 669 *affd. in part, app. dismissed in part* 67 N.Y.2d 739 (1986).

Each defendant has proved it is entitled to summary judgment dismissing plaintiff's complaint. Paradise has proved that its security arrangements were reasonable and that the criminal act of plaintiff's assailant was an extraordinary act, under the facts of this case. Plaintiff has failed to raise triable issues of fact that Paradise's security arrangements were unreasonable and that the actions of his

assailant were foreseeable. Plaintiff's expert presents conclusions offered without any supporting facts. Thus, his opinion that Paradise did not follow proper "procedures" and deviated from "reasonable and customary practices" is presented without any explanation about what those practices are.

Emmis has proved it was not responsible for security at the Paradise Theater, and that it did not assume that responsibility. In the absence of duty, there is no breach and without a breach there is no liability to plaintiff. Pulka v. Edelman, 40 NY2d 781 *rearg den* 41 NY2d 901 (1977).

Both defendants' are entitled to summary judgment dismissing the complaint and each of their motion for such relief is granted. The clerk shall enter judgment in favor of each defendant dismissing the complaint against them. Since the cross claims between the defendants arise from the claims by the plaintiff, the cross claims are hereby dismissed as well.

### **Conclusion**

In accordance with the foregoing,

IT IS HEREBY

**ORDERED** that the motions by defendant Paradise Theater Productions, Inc. and defendant Emmis Communications Corporation for summary judgment dismissing the complaint against each of them is granted and the claims against them are dismissed; and it is further

**ORDERED** that the cross claims between defendant Paradise Theater Productions, Inc. and defendant Emmis Communications Corporation are also

dismissed; and it is further

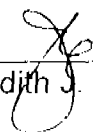
**ORDERED** that the Clerk shall enter judgment in favor of defendant Paradise Theater Productions, Inc. and defendant Emmis Communications Corporation dismissing the complaint; and it is further

**ORDERED** that any relief 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, New York  
October 27, 2009

So Ordered:

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

**FILED**  
OCT 29 2009  
COUNTY CLERK'S OFFICE  
NEW YORK