

**Kandil v 199 Bowery Rest LLC**

2010 NY Slip Op 30019(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 106653/08

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 106653/2008

**KANDIL, MOHAMMED**

vs.

**199 BOWERY**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

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

MOTION DATE 1/24/09

MOTION SEQ. NO. 001

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

n 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

**FILED**

JAN 08 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendant's motion for summary judgment pursuant to CPLR §3212 dismissing the Complaint is denied; and it is further

ORDERED that defendant 199 Bowery Rest LLC, d/b/a Blvd Crash Mansion shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/15/2010

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**HON. CAROL EDMEAD**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
MOHAMMED KANDIL,

Plaintiffs,

-against-

199 BOWERY REST LLC, d/b/a BLVD CRASH  
MANSION,

Defendant.

-----X  
HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 106653/08

**FILED**  
JAN 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff, Mohammed Kandil ("plaintiff"), commenced this action against defendant, 199 Bowery Rest LLC, d/b/a Blvd Crash Mansion ("defendant" or "Blvd Crash"), for personal injuries he sustained from an incident in the defendant's nightclub on February 25, 2007. Defendant now moves for summary judgment pursuant to CPLR §3212 dismissing the Complaint.

*Background*<sup>1</sup>

On February 25, 2007, plaintiff was present at the Blvd Crash nightclub located at 199 Bowery Street, New York, New York (the "Premises"), when he was attacked by other patrons and struck in the body and face by a drunk patron during a violent altercation at or near the dance floor and restaurant area of the night club.<sup>2</sup> Plaintiff alleges that defendant was negligent (a) in failing to provide adequate security measures to protect plaintiff from harm, and (b) in the

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<sup>1</sup> These facts are taken from plaintiff's Complaint and plaintiff's Verified Bill of Particulars.

<sup>2</sup> Plaintiff also claims to have slipped and fallen on a dangerous substance on the dance floor. However, plaintiff does not assert this allegation in his opposition to the present motion.

ownership, operation, supervision, management, control and/or maintenance of the premises.<sup>3</sup> (Complaint, ¶¶15 and 16). Plaintiff further alleges that defendant had actual notice of the inadequate security and the altercations were foreseeable. Defendant also had constructive notice of the dangerous situation as it existed for a sufficiently long time such that the defendant with the exercise of reasonable care, should have discovered same prior to the incident.

Defendant now moves for summary judgment dismissing plaintiff's claims of negligence on the ground that the alleged altercation was not foreseeable and that defendant took reasonable and adequate security measures. Defendant argues that the altercation between plaintiff and other patrons was a spontaneous and random act and could not have been foreseen because, as plaintiff testified at his deposition, before the incident occurred, he could not see anyone fighting or acting in a disruptive manner, and after the initial altercation, things "calmed down." (Plaintiff's deposition, p. 51).

According to defendant, when plaintiff heard his friend Osama Elmkadem ("Osama"), who accompanied plaintiff to the club, yell at another patron "Why are you hitting me for no reason?", he moved closer to Osama to see what was happening and at that point he calmed down Osama. (Plaintiff's deposition, pp. 42, 51-53). Consequently, defendant argues, because things had calmed down, there was no reason for the security guards to intervene.

Within the ensuing few minutes, plaintiff found himself enclosed in a circle of approximately forty people who, at first, did not seem "to do anything." (*Id.* at 72-73.) While plaintiff saw a security guard standing about seven feet away from the dance floor, there was no altercation at that particular point in time and, thus, "the security guard could not have foreseen any violent clash at that time." According to plaintiff's testimony, "things happened very fast."

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<sup>3</sup> Plaintiff also claims that defendant negligently hired, trained, and retained its employees who were present at the scene of the incident and did not intercede in any fashion.

Next, defendant contends, plaintiff fell to the floor losing consciousness for about three minutes after receiving a blow to the back of his head and therefore, plaintiff did not know what, if anything, the security did to diffuse the situation.

Defendant claims that security at the Premises was adequate because, (1) as one of the club managers, Richard Chan ("Chan"), testified at a deposition, "in 2007, on a Saturday night, there would be approximately five to twenty five security guards, depending on the number of guests on the guest list, they would mandate one security guard per seventy-five guests"(Chan deposition at p. 13), and (2) plaintiff himself testified that on that night, the club had "more security than he had ever seen at any other club." (Plaintiff's deposition at 29). Based on caselaw, defendant argues that it would have been impossible to prevent plaintiff's injuries unless there were security guards posted at every location in the club, which is an unreasonable burden, and that the altercation at issue was unforeseeable and spontaneous.

In opposition, plaintiff contends that defendant failed to demonstrate the absence of material issues of fact as to whether defendant's security guards had sufficient reason and opportunity to intervene after the initial lengthy and heated altercation between plaintiff's friend and the unruly patrons, but before the brawl which followed and during which plaintiff sustained his injuries. At minimum, there is an issue of constructive notice to defendant.

Plaintiff points to the testimony of Osama, who testified that (1) both plaintiff and Osama were being threatened, harassed and subsequently assaulted for about 20 minutes or more, and (2) Osama had notified the security guards that they were being threatened. Moreover, even though "a large observable fight" followed after the initial altercations, defendant did not intercede to diffuse the altercations and protect plaintiff from the assailants. Plaintiff points to

the annexed hospital and criminal records which corroborate some of the details of this incident, confirming that plaintiff was "trampled on" and assaulted in the club.

Further, Blvd Crash, as a late night club, which undertook to provide its own security to its customers, has the duty to provide security in a reasonably safe manner. Chan, one of the club security managers, testified that Blvd Crash's own security policies and procedures require that (1) security guards "break up anticipated fights, and, if there is an altercation, respond, intervene and separate individuals" and (2) complete and maintain incident reports. Yet, defendant does not offer any explanation of what, if anything, security did to diffuse either the initial situation or the following assault on plaintiff, and, there is no report of this incident in Blvd Crash's records.

Plaintiff claims that defendant cannot establish entitlement to dismissal because: (1) no affidavit from a witness with knowledge was submitted, while the deposition transcript of defendant's witness demonstrates only that defendant has no knowledge of the facts and circumstances of the incident herein and (2) defendant has not provided any records or reports of the incident.

Additionally, plaintiff annexes the report and affidavit of his security expert to raise an issue as to whether other, more adequate safety measures could have been undertaken to prevent the incident in question. Plaintiff's expert points out that the actual and constructive notice to security guards in the immediate area of the fight, the heavy consumption of the alcohol, the lack of risk assessments and the inadequate security program support his conclusion that the conditions that existed at the club on February 25, 2007, made it clear that the subject incident was foreseeable.

*Discussion*

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not

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feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To establish a *prima facie* case of negligence, plaintiff must prove that the defendants owed him a duty of care, and breached that duty, breached a duty of care that was owed to the plaintiff and that the breach proximately caused his injury (*Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]).

An owner or occupier of land has a legal duty to exercise reasonable care under the circumstances to maintain the premises in a reasonably safe condition. (Rest. 2d, Torts § 344). That duty includes taking minimal precautions to protect members of the public from reasonably foreseeable criminal acts of third parties, (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507 [1980]; *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544 [1998]) and controlling the conduct of persons on the premises when the owner has the opportunity to do so and is reasonably aware of the need for such control (*Id.*). However, the Court of Appeals has noted that a possessor of land is not an insurer of the visitor's safety, and to establish the existence of a duty on his or her part to take minimal protective measures, it must be shown "that there is a likelihood of conduct on the part of third persons ... which is likely to endanger the safety of the visitor" (*Nallan*).

Once a plaintiff establishes that a duty exists, he or she must then demonstrate that the defendant breached that duty by failing to provide minimal precautions against the foreseeable criminal acts of third parties, and that the breach was a proximate cause of his or her injuries. (*Nallan, Burgos, supra*). The question of what safety precautions may reasonably be required is generally a question of fact to be determined by the jury (*Id.*)

Construing the facts in the instant case in the light most favorable to the plaintiff, (*Insurance Co. of New York v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1<sup>st</sup> Dept 2008]), the court concludes that defendant herein failed to make a *prima facie* showing of entitlement to judgment as a matter of law.

It is undisputed that defendant had a duty to protect its patrons from unreasonable harm of third parties since Blvd Crash undertook to provide its own security on the Premises. According to its security policies and procedures, in case of an altercation, security guards are to “respond, intervene and separate the individuals” (Chan deposition, pp. 16-22) (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 522-523; *Haber v Precision Security Agency*, 24 Misc 3d 1229, ---NYS2d --- [Supreme Court New York County 2009]). In *Haber*, where plaintiff and his friend were injured after being attacked by other patrons within the roped-off area in front of the defendant night club's entrance, the court rejected defendant's argument that the incident was unforeseeable, stating that, “the fact that [the security provider employed by the club] had a policy to intervene with ‘rowdy patrons’ provides a reasonable basis for a jury to conclude that the type of altercation plaintiff was involved was foreseeable” (*Id.*)

However, contrary to its contentions, Blvd Crash failed to establish that plaintiff's injury was unforeseeable and that it undertook adequate security measures. At the outset, the Court notes that defendant failed to submit any evidence in support of its contention that the security measures were adequate. The defendant's witness, Chan, also had no personal knowledge of the subject incident and stated that there is no report of the incident in defendant's records.

As to foreseeability, *Shank v Riker Restaurants Associates, Inc.* (28 Misc 2d 835 [Supreme Court New York County 1961]) is instructive. In *Shank*, a restaurant was found liable for the injuries sustained by the plaintiff after the plaintiff was attacked by a third party in the

restaurant. The court noted that before the assault, for 20 minutes, the third party created a disturbance in the restaurant, “berating customers in a vile manner.” The third party even “drop-kicked” a glass “against the kitchen door causing water and pieces of glass to spray over a wide area” ( *id.* at 836). The manager of the restaurant called the police, but then cancelled the call after the third party apologized and offered to pay for the glass. Later, the third party was joined by two others and started physically attacking customers, including the plaintiff. In holding that the third party's violent acts were foreseeable, the court stated: “While it might be said that the manager had no duty to eject him solely because of his vile and abusive language, when he drop kicked' the glass of water it became abundantly clear that the hoodlum' constituted a source of physical danger to defendant's patrons” ( *id.* at 837).

According to plaintiff's and Osama's testimonies at each of their deposition, certain patrons and plaintiff and his friend Osama were exchanging heated words and hitting and/or pushing each other within approximately 20 minutes prior to the alleged assault and the security guards, who were in the vicinity of the dance floor and the bar areas, were aware of the rising tension between these patrons. The record shows that there was an approximate five to 20 minutes exchange of heated words and physical altercations between plaintiff's friend Osama and the intoxicated patron, followed by another seven to 20 minutes period of increasingly heated arguments and violence between plaintiff and the belligerent patron, after which a group of patrons surrounded plaintiff and assaulted plaintiff from behind. These facts contradict defendant's claim that the assault on plaintiff was unexpected ( *see also Barshay v 273 Brighton Beach Ave. Rest., Inc.*, 20 Misc 3d 1116 [Supreme Court New York County 2008] [construing the facts in the light most favorable to the plaintiffs, an issue of fact exists as to whether the incident was foreseeable or unexpected, given plaintiff's claim that the defendant restaurant knew or

should have known that patrons were exchanging heated words and fighting in the restaurant approximately 20 minutes prior to the alleged assault and that an employee was aware of the tension between these patrons”]). Furthermore, that Blvd Crash had a policy to “respond, intervene and separate” rowdy patrons provides a reasonable basis for a jury to conclude that the type of altercation in which plaintiff was involved was foreseeable.

At the very least, there are triable issues of fact as to whether security had sufficient time to intervene inasmuch as the entire incident occurred within a span of five to 25 or more minutes. The record indicates that the security guards were present at the scene, that they observed and heard plaintiff’s friend Osama and the intoxicated patron yelling at each other, Osama was punched in the face and the other individual threw plaintiff against the wall just prior to the time when the plaintiff was surrounded by a group of patrons and assaulted. Such facts permit a reasonable jury to conclude that defendant’s security employees were close enough to hear and observe the altercation, and to intervene in the attack which caused plaintiff’s injuries.

Moreover, plaintiff raises an issue as to whether the security guards had actual notice of the dangerous situation. Plaintiff and Osama both testified in depositions that they or their third friend notified the security guards that they were being threatened and harassed, but the security guards did not take any action. Plainly, these testimonies raise triable issues as to the sufficiency of defendant’s response to the initial and later altercations and warnings, and, accordingly, as to whether plaintiff’s harm is substantially attributable to negligence by defendant in the performance of its security obligations as it had undertaken on its [own] behalf (*see Shaw v Riverbay Corp.*, 286 AD2d 638 [1<sup>st</sup> Dept 2001], citing *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 522).

The cases cited by defendant for the proposition that it is not liable to plaintiff are

distinguishable (*Florman v City of New York*, 293 AD2d 120 [1st Dept 2002] [where a driver of an offending vehicle struck plaintiff the parking lot of a concert stadium, driver's actions were not a foreseeable consequence of defendant's alleged failure to provide adequate security; although some forms of criminal activity might have been reasonably foreseeable in a gathering of this kind, that someone would drive, recklessly or intentionally, at high speed in a parking field striking standers-by is not a danger normally associated with crowd control]; *Napolitano v Madison Square Garden Ctr., Inc.* 195 Misc 2d 659 [NY Sup. App. Term 2003] ["Absent from the record is any evidence that defendant's security guards knew or should have known that the underlying altercation was imminent or that plaintiff was faced with any foreseeable risk of danger"]; *Maheshwari v City of New York*, 2 NY3d 288 [2004] ["the brutal attack was not a foreseeable result of any security breach. The types of crimes committed at past . . . , concerts are of a lesser degree than a criminal assault, and would not lead defendants to predict that such an attack would occur or could be prevented]). The case at bar is distinguishable from these cases in which the assaults were spontaneous, occurred in random unmonitored locations and defendants therein had no reasonable opportunity to intervene to prevent the assaults. Here, the assault of the plaintiff was a culmination of the previous lengthy verbal and physical altercations, which lasted for a period of approximately five to 20 or more minutes, while the security guards were allegedly stationed in the immediate vicinity and observed the incident.

Consequently, defendant failed to advance sufficient evidentiary proof to demonstrate the absence of material issue of fact as to whether defendant provided adequate security measures to protect plaintiff from harm.

*Conclusion*

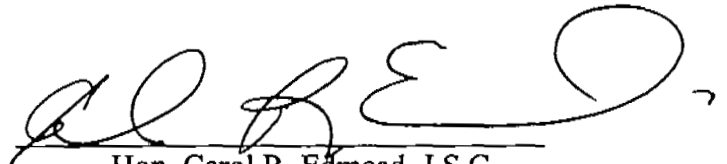
Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment pursuant to CPLR §3212 dismissing the Complaint is denied; and it is further

ORDERED that defendant 199 Bowery Rest LLC, d/b/a Blvd Crash Mansion shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 5, 2010

  
Hon. Carol R. Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
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