

**Massey v Sterling Mets, L.P.**

2011 NY Slip Op 30644(U)

March 17, 2011

Supreme Court, New York County

Docket Number: 105992/07

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number : 105992/2007  
**MASSEY, ELLEN**  
vs.  
**STERLING METS LP**  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 005  
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 (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**

MAR 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: MAR 17 2011

  
HON. JUDITH J. GISCHE J.S.C.  
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  
ELLEN MASSEY,

Plaintiff,

**-against-**

STERLING METS, L.P.; ARAMARK SPORTS AND ENTERTAINMENT GROUP, INC. d/b/a ARAMARK @ SHEA STADIUM; SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) LOCAL 177; THE CITY OF NEW YORK; and TIMOTHY CASSIDY,

Defendants.

-----X  
TIMOTHY CASSIDY,

Third-Party Plaintiff,

**-against-**

ERIC METZGER,

Third-Party Defendant.

-----X  
STERLING METS, L.P. and THE CITY OF NEW YORK,

Second Third-Party Plaintiffs,

**-against-**

ERIC METZGER,

Second Third-Party Defendant.

-----X  
ARAMARK SPORTS AND ENTERTAINMENT GROUP, INC. d/b/a ARAMARK @ SHEA STADIUM

Third Third-Party Plaintiff,

**-against-**

ERIC METZGER,

Third Third-Party Defendant.

-----X

**DECISION/ ORDER**  
Index No.: 105992/07  
Seq. No.: 005, 006

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

Third-Party  
Index No.: 9591082/09

Second Third-Party  
Index No.: 590077/10

Third Third-Party  
Index No.: 590541/10

**FILED**

**MAR 18 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

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

PAPERS .....	NUMBERED
<b>SEQ. #005</b>	
HMS n/m ( § 3212) w/DWF affirm, exhs .....	1
HMS supplemental affirm (DWF), exh .....	2
 <b>SEQ. #006</b>	
Sterling & City's n/m ( § 3212) w/CV affirm, DTM, BS affids, exhs .....	3
Pltf's opp w/JDK affirm, exhs .....	4
Sterling & City's reply w/CV affirm, DTM, BS affids, exhs .....	5

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

This is an action by plaintiff, Ellen Massey ("Massey"), to recover monetary damages for the personal injuries she sustained while attending a Mets game at Shea Stadium ("Shea"), allegedly as a result of defendants' negligence. Sterling Mets, L.P. ("Sterling") is the operator and tenant in possession of Shea Stadium. The City of New York (the "City"), owns the property. Harry M. Stevens, LLC ("Stevens"), sued herein incorrectly as Aramark Sports and Entertainment Group, Inc. d/b/a Aramark @ Shea Stadium ("HMS") operates concessions for food, drinks, and merchandise sales at Shea, including the sale of alcoholic beverages. Timothy Cassidy ("Cassidy") is the individual who fell on top of Massey, causing her injuries. Third-party, second third-party, and third third-party actions for indemnification and contribution were later commenced against Eric Metzger ("Metzger"), the individual who allegedly pushed Cassidy, causing him to fall on top of Massey. Defendants also assert various cross-claims against each other for indemnification and contribution. Service Employees International Union (SEIU) Local 177 was previously dismissed from the case (Order,

10/22/07, Hon. Rolando T. Acosta).

HMS now moves, pursuant to CPLR § 3212, for summary judgment dismissing plaintiff's complaint (Seq. # 005). Sterling and the City, who are jointly represented, also move for summary judgment dismissing Massey's complaint against them (Seq. # 006).

Issue has been joined by each moving defendant and discovery is complete. The Note of Issue was filed on March 1, 2010 in the main action and on April 23, 2010 in the third-party actions. These motions were brought timely (within 120 days of the note of issue being filed), therefore they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

### **Arguments**

Plaintiff claims that on April 9, 2007 at approximately 3:30/4:00 p.m., she sustained injuries while attending the Mets opening game at Shea Stadium with her two nephews. Plaintiff claims that while she was sitting in her seat, watching the Mets/Phillies game, a large man weighing approximately 250-300lbs, later identified as Cassidy, fell on top of her. Plaintiff was seated in the 2<sup>nd</sup> row of upper deck section 43, and Cassidy was seated 4-5 rows behind plaintiff, also in section 43. In turn, Cassidy contends that Metzger pushed him, causing him to fall on plaintiff.

Plaintiff originally brought two complaints, one in New York County and one in Queens County. In her New York County complaint (Index No. 105992/07), plaintiff asserted a cause of action against Cassidy, Sterling, and HMS for negligence (NY-

COA1) and against Sterling and HMS for violating GOL § 11-101 (the Dram Shop Act) (NY-COA2). In the Queens County complaint (Index No. 14844/08), plaintiff asserted a cause of action against the City for negligence in failing to provide adequate security and for allowing alcoholic beverages to be sold to Cassidy while he was intoxicated (Qu-COA1) and against Cassidy for negligence (Qu-COA2). The two actions were, thereafter, consolidated, pursuant to CPLR § 602, under the New York County index number.

Discovery has been completed. Plaintiff served Verified Bill of Particulars dated September 4, 2007, May 12, 2008, March 19, 2009, and October 19, 2009. The following individuals were deposed: Plaintiff; Cassidy; Metzger; Bryan Merrigan ("Merrigan") (non-party witness and friend of Cassidy); Brian J. O'Mara ("O'Mara") (non-party witness and friend of Cassidy); Matthew Aronowitz ("Aronowitz") (non-party witness and friend of Cassidy); Daniel Massey ("Daniel") (non-party witness and nephew of plaintiff); Peter Rubens ("Rubens") (non-party witness and nephew of plaintiff); Daniel P. Keague ("Keague") (non-party witness); Aaron J. Levine ("Levine") (non-party witness); Robert Thomas ("Thomas") (non-party witness); Lois Walcott ("Walcott") (non-party witness); Sean Dean ("Dean") (security supervisor at Shea); Bruce Smith ("Smith") (director of events personnel at Shea); Richard Marino ("Marino") (security supervisor at Shea); and Kenneth O'Connor ("O'Connor") (HMS employee).

HMS contends that it is entitled to summary judgment dismissing the complaint because plaintiff cannot establish a *prima facie* case that Cassidy was intoxicated while at the game, that intoxication caused Cassidy to fall, or that Cassidy was served alcoholic beverages, notwithstanding that he was visibly intoxicated. In support of its

motion, HMS relies on the following testimony elicited at depositions ("EBT's"):

Cassidy testified at his EBT that he consumed three beers prior to falling, but that he was not intoxicated when he fell on plaintiff, he fell because he was pushed. Cassidy stated that he and Metzger exchanged "banter back and forth during the game . . . more or less about the game itself, players, things of that nature." Cassidy stated that at one point, when he was talking on his cell phone, Metzger stated "put the fucking Treo away buddy." At that point, Cassidy stood up and "turned around to say something" when Metzger pushed him in a "pretty violent" manner, causing him to "[fly] backwards" and fall onto Massey.

Merrigan testified at his EBT that Cassidy had consumed "less than five" beers prior to the incident. He stated, "we all took turns purchasing, so I could have purchased them, a beer, or Brian O'Mara could have purchased him a beer or Matt Aronowitz could have purchased him a beer. We typically take a couple of rounds . . . I do recall [Cassidy] purchased beers, but I did not see him purchase the beers."

O'Mara, who also attended the game with Cassidy, stated, "we all pretty much bought a round" and that Cassidy consumed "four . . . maybe five" beers. O'Mara testified at his EBT that based upon his training as a police officer, and upon his personal experiences with Cassidy, he "did not see any sign that [Cassidy] was intoxicated . . . As I remember, there was no watery eyes, no glassy eyes. No flushness. He was boisterous, but that's not out of the norm from him, so that wouldn't be interpreted as a sign of intoxication."

Sterling and the City contend that they are entitled to summary judgment because the incident was the result of an unforeseeable, random act and was not

caused by any lack of security or negligent act on their part. Sterling and the City argue that they provided adequate security, no sections were left unattended, there was no actual or constructive notice of a dangerous condition, and that the accident was proximately caused by Metzger's unforeseeable intervening criminal act of shoving Cassidy into the crowd.

In support of their motion, Sterling and the City rely on the following deposition testimony: Cassidy testified that "less than three" seconds elapsed between the time he stood up to tell Metzger to leave him alone and the push. Metzger also testified that the incident occurred "within seconds" after Cassidy turned around towards him and fell. O'Mara stated that although he was not present at the time of the incident, he "didn't envision there being a problem" and he did not observe Cassidy "behaving in an inappropriate way to other fans in the section."

Smith testified that the amount of security at any given game depends on the attendance. He stated that in upper level section 43, there was "a permanent man, maybe one section over. That's his steady post . . ." and "we have people in the upper deck that are stationed and people that patrol the upper deck . . . [in section 43] there would be one." Dean stated in his EBT that although security moves around, the sections are always attended and there is always a security "presence" within the section.

Plaintiff has provided the affidavit of David L. Johnston ("Johnston), who identifies himself as being an expert witness in the field of security. Johnston opines that, "the Mets failed to provide adequate security at the game on April 7, 2007 . . . and . . . this failure was a proximate cause of the accident in question, and of Ms. Massey's

injuries.”

### Discussion

#### Summary Judgment – Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

## HMS's Motion for Summary Judgment

The Dram Shop Act provides, in relevant part, as follows:

1. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

On this motion, defendant has the initial burden of negating the possibility that it served alcohol to a visibly intoxicated person. Cohen v. Bread & Butter Entertainment LLC, 73 A.D.3d 600 (1st Dept. 2010); Darwish v. City of New York, 287 A.D.2d 407 (1st Dept. 2001). Only once this is proven, does the burden shift to plaintiff to adduce evidence that defendant served alcohol to the assailant despite visible signs of intoxication. Cohen v. Bread & Butter Entertainment LLC, *supra* at 601; McGovern v. Katonah, 5 A.D.3d 239 (1st Dept. 2004); Duran v. Poggio, 244 A.D.2d 162 (1st Dept. 1997).

Here, HMS has failed to meet its burden. It is undisputed that HMS sold alcoholic beverages at Shea on the date of the accident. Yet, HMS provides no evidence to negate the possibility that it served alcohol to Cassidy while he was visibly intoxicated. For example, defendant has not provided affidavits from its employees who were selling alcohol on the date of the accident, or any other evidence that would shift the burden to plaintiff.

Furthermore, even if HMS did meet its initial burden, there is ample testimony

that Cassidy was seen holding alcoholic beverages, was using vulgarity and slurring his speech, had trouble maintaining his balance, and exhibited other mannerisms that indicated he was intoxicated. For example, Rubens testified that immediately after the accident, Cassidy "was actually looking back up into the upper deck from where he came with sort of a . . . strange grin on his face . . . just appearing to be intoxicated and kind of laughing at the whole thing." Walcott testified that shortly before the incident, Cassidy randomly took nachos from Walcott's plate without asking, "he took I think two chips, and he scooped – it was either one chip or two and I know that he scooped up and ate, and then walked back to his seat." Thoms also testified that he saw Cassidy consume "at least three" beers in the first inning alone. Even Cassidy's friends, Merrigan and O'Mara, testified that Cassidy consumed approximately four beers. The other witnesses also testified at their EBT's that Cassidy acted in a manner consistent with him being under the influence of alcohol. The testimony, when viewed in the light most favorable to plaintiff, is sufficient to raise an issue of fact as to whether defendant served alcohol to a visibly intoxicated person. McGovern v. Katonah, *supra*; Dollar v. O'Hearn, 248 A.D.2d 886 (3d Dept. 1998). A reasonable juror could conclude that HMS served alcohol to Cassidy while he was visibly intoxicated

Accordingly, HMS's motion for summary judgment is denied.

### **Sterling and the City's Motion for Summary Judgment**

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 N.Y.3d at 294 (internal citations omitted). The possessor of land has no duty to protect persons against 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). Furthermore, the mere fact that an accident occurs does not mean that a defendant is liable; the plaintiff needs to 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).

As operator and tenant in possession of Shea, Sterling had a duty to undertake reasonable security measures to protect people entering the stadium. Maheshwari v. City of New York, *supra.*; Nallan v. Helmsley-Spear, Inc., *supra.* This includes maintaining minimal security precautions to protect users of the premises against injury caused by the reasonably foreseeable criminal acts of third persons.

Once Sterling establishes a prima facie case, that it fulfilled its obligation to provide security, the plaintiff must then 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]). "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*.

Sterling has failed to establish that Cassidy's fall was unexpected and spontaneous. Here, a reasonable jury can find that the incident was foreseeable and could have reasonably been anticipated. There is ample testimony that Cassidy was being "loud and boisterous" and that the security guard who walked by section 43 "chuckled to himself . . . when [Cassidy] was being loud and boisterous." Thomas testified that "he became real vulgar, started trying to pick a fight with anybody he can. He told me and my cousin he would kick both of our – excuse my French, asses." Thomas stated that Cassidy attempted to pick fights with four to five individuals during the sixth and seventh innings. Regardless of whether Cassidy's fall was sudden and unexpected, a jury could find that it was foreseeable Cassidy's conduct was putting the safety of other members of the public at risk. The security guards could have confronted or ejected Cassidy from the stadium based on his visible intoxication and/or his aggressive behavior towards other fans. In fact, Sterling's own policy provides that "drunk or disorderly fans will be denied admittance to the stadium."

Even if Sterling had satisfied its burden on this motion, plaintiff has raised issues of fact as to whether Sterling should have been aware that a potentially dangerous situation existed, and breached their duty to exercise adequate supervision and control over their patron's behavior, precluding summary judgment dismissing plaintiff's negligence claim. See Dollar v. O'Hearn, *supra* at 887; Kern v. Ray, 283 A.D.2d 402

(2d Dept. 2001).

Here, not only has Sterling failed to meet its burden of proof, but there are triable issues of fact requiring the denial of its motion. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Rotuba Extrudes v. Ceppos, 46 N.Y.2d 223 (1978). The determination of whether Sterling was negligent is for the trier of fact to decide. Ugarriza v. Schmieder, 46 N.Y.2d 471 (1979).

With respect to the City, the analysis is somewhat different. Generally, an out-of-possession landlord cannot be held liable for injuries sustained by a plaintiff on its property if the landlord did not retain control over the premises pursuant to contract or statute. Landy v. 6902 13th Ave. Realty Corp., 70 A.D.3d 649 (2d Dept. 2010); Hernandez v. Seven Fried Food, 292 A.D.2d 343, 344 (2d Dept. 2002). The City has established that it is an out-of-possession landlord, and Sterling, as the operator and tenant in possession, was responsible for providing security at the stadium. Plaintiff, in its opposition, does not address why summary judgment should not be granted in favor of the City, therefore, it appears that plaintiff's claims against the City have been abandoned. Having failed to oppose this branch of the City's motion or raise triable issues of fact, the City's motion for summary judgment dismissing the complaint as to them is granted.

### Conclusion

The City's motion for summary judgment is granted. Sterling and HMS's motions for summary judgment are denied, as they have not tendered sufficient evidence to eliminate any material issues of fact from the case. Since the note of issue has been

filed, this case is ready to be tried. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial.

*In accordance herewith, it is hereby:*

**ORDERED** that defendant, THE CITY OF NEW YORK's motion for summary judgment dismissing the complaint and cross-claims against it is GRANTED; and it is further

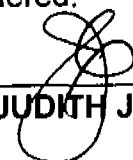
**ORDERED** that defendants, STERLING METS, L.P. and ARAMARK SPORTS AND ENTERTAINMENT GROUP, INC. d/b/a ARAMARK @ SHEA STADIUM's motions for summary judgment dismissing the complaint against them is DENIED; and it is further

**ORDERED** that since the note of issue has been filed, this case is ready to be tried on the remaining issues. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial; and it is further

**ORDERED** that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

**ORDERED** that this shall constitute the decision and order of the Court.

Dated: New York, New York  
March 17, 2011

So Ordered:  
  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

MAR 18 2011

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