

Faust v East Wind Caterers, LLC
2011 NY Slip Op 32342(U)
September 1, 2011
Supreme Court, Suffolk County
Docket Number: 07-15746
Judge: Denise F. Molia
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INDEX No. 07-15746
CAL No. 10-02333OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 04-01-11 (#005)
MOTION DATE 03-28-11 (#006)
ADJ. DATE 6-24-11
Mot. Seq. # 005 - MG; CASEDISP
006 - MG

-----X
MICHAEL J. FAUST,

Plaintiff,

- against -

EAST WIND CATERERS, LLC,
KNIGHTWORLD INC., AAA SECURITY,
INC., AAA SECURITY PATROL SERVICES,
INC. and JOHN DOE,

Defendant.
-----X

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Upon the following papers numbered 1 to 44 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; 12 - 24; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 25 - 28; Replying Affidavits and supporting papers 29 - 34; 35 - 40; Other 41 - 44; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (005) by defendants East Wind Caterers, LLC and Knightworld, Inc. for summary judgment and the motion (006) by defendant AAA Security, Inc. for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (005) by defendants East Wind Caterers, LLC and Knightworld, Inc. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's complaint and all cross claims as against them is granted; and it is further

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ORDERED that the motion (006) by defendant AAA Security, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiff's complaint and any cross claims as against it is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff to his right hand on October 28, 2006 at approximately 10 p.m. when he was assaulted during a Halloween party by an unidentified man wearing a black ninja costume and wielding a metal sword in the lobby of the Inn at East Wind located at 5720 Route 25A, Wading River, New York. The plaintiff alleges that the defendants East Wind Caterers, LLC (East Wind), Knightworld, Inc. (Knightworld), and AAA Security, Inc. (AAA) created a dangerous condition through their negligence in failing to provide adequate security on the premises.

Defendants East Wind and Knightworld now move for summary judgment dismissing plaintiff's complaint on the grounds that they had no duty to protect the plaintiff patron from a spontaneous and unforeseeable assault, that there was no evidence that intense supervision could have anticipated the altercation and prevented the assault, and that they provided reasonable security by hiring AAA to patrol and report problems. In support of their motion, they submit the pleadings, the bill of particulars, the deposition transcripts of plaintiff, Louis Ambrosio (Mr. Ambrosio), general manager of East Wind, and Walter Degolyer (Mr. Degolyer), principal of AAA, and the affidavit of Mr. Ambrosio.

Defendant AAA now moves for summary judgment dismissing plaintiff's complaint on grounds including that the plaintiff was not a third-party beneficiary of the oral agreement between AAA and East Wind to provide security services during the Halloween party; that it had no duty to protect plaintiff patron from spontaneous and unforeseeable assault that could not have been prevented by the most vigilant supervision; and that it had no actual or constructive notice of the alleged dangerous condition of the man carrying a sword prior to plaintiff's incident. In support of its motion, AAA submits, among other things, the pleadings, the bill of particulars, the deposition transcripts of plaintiff, Mr. Ambrosio, and Mr. Degolyer, and the unsworn police accident report.

The plaintiff's deposition testimony of July 22, 2009 reveals that he and his wife, Michelle Faust, as well as friends and relatives went to a Halloween party given by the East Wind on October 28, 2006 and arrived there at 7:00 p.m. The plaintiff testified that he and his group gave their tickets to employees at the entrance lobby and then proceeded to the ballroom where they remained a few hours prior to the subject incident. In addition, the plaintiff testified that he had eaten at home and did not eat anything at East Wind but that he consumed 6 or 7 beers at East Wind. According to the plaintiff, the incident occurred at approximately 10:30 p.m. when he and his wife entered the rear lobby intending to exit the building to smoke. The plaintiff stated that others in their group were already in the rear lobby and they were not arguing or in an altercation. He also testified that the incident occurred two seconds after he and his wife entered the rear lobby where he heard yelling and observed, approximately five feet away, a blond haired man dressed all in black, without a mask, waving a sword over his head towards someone else and that people were running away. The plaintiff further testified that there was nothing preventing him from turning around and returning to the ballroom but that he instead tried to stop the man by grabbing him and holding him in a bear hug from the side. The plaintiff also stated that when he was within two feet of him, the man slashed the plaintiff's right hand with the sword injuring four fingers, and that the plaintiff never learned of the identity of the individual. He further stated that he did not see any security personnel in the ballroom

or in the rear lobby and did not make any complaints or know of anyone who made complaints regarding any problems or altercations in those areas prior to the subject incident. The plaintiff did not fill out any incident report at East Wind.

The general of manager of East Wind, Mr. Ambrosio, testified at his deposition on November 3, 2009 that the East Wind held a Halloween party in October 2006 between the hours of approximately 7:30 p.m. and 11:30 p.m, he was circulating around the building, and approximately 30 East Wind employees, from managers to kitchen staff, were working that evening. According to Mr. Ambrosio, about 500 tickets were probably sold for the event, AAA personnel would usually check the tickets at the door, and there would be an East Wind employee at the check-in table. He described the ballroom as 21,000 square feet with a capacity to hold over 1000 people. Mr. Ambrosio testified that East Wind had an oral agreement with AAA to provide security at most events and that he would call Mr. Degolyer to schedule security for events and discuss where the security personnel would be located. In addition, Mr. Ambrosio testified that there were two to three security guards from AAA during the Halloween party of 2006, and that the security personnel wore suits, with or without ties, that they were circulating the ballroom and main lobby, and were allowed to go outside and smoke. He explained that there were two doors exiting the ballroom in the rear, north side, which exited to the rear lobby of approximately 1500 square feet containing furniture, a gas fireplace, a piano and bathrooms, and that four doors in the rear lobby exited outside the building. Mr. Ambrosio recalled seeing security personnel in the north lobby during the Halloween party. He did not recall seeing an individual dressed in a black ninja costume with a sword. Mr. Ambrosio stated that he first became aware of a problem that evening when there was a commotion, consisting of pushing, shoving and shouting, involving a group of about 20 people at the northeast side of the ballroom and that he, other East Wind employees, and the AAA security personnel attempted to direct the group out the doors into the rear lobby to separate the group from the rest of the patrons in the ballroom. He also stated the he observed people at the center of the group actually fighting when they were in the rear lobby. According to Mr. Ambrosio, some of the people in the group left the building, some stayed, and after the fight ended in two and a half to three minutes, the police were called. It was only after the fighting ended that he heard that someone had been injured by an individual with a sword who had left the premises. Mr. Ambrosio explains in his affidavit dated February 24, 2011 that Knightworld was a corporation established for the East Wind Hotel and has no relationship to the subject incident. He also avers in his affidavit that "at no time that evening did I observe any altercation, argument, pushing or shoving or any loud discussions in either the ballroom or any lobby before the incident involving Michael Faust."

The deposition testimony of Mr. Degolyer from November 3, 2009 reveals that he is the principal of the now defunct AAA, which employed part-time employees, and that he arranged for AAA to work for East Wind by contacting Mr. Ambrosio who would specify the number of employees needed. He could not recall how many employees AAA had in 2006 and exactly which employees were working at East Wind during the 2006 Halloween party. He approximated that three AAA employees worked that evening. Mr. Degolyer testified that the security guards were unarmed but had radios, that they did not do any type of screening or determination as to whether anyone was carrying weapons, and that it was not their responsibility to check identification to see if people were of age to drink alcohol or to remove weapons. In addition, he testified that he was notified of the subject incident at approximately 12:30 a.m. on October 29, 2006 and thereafter arrived at East Wind, after the party had ended, and spoke to Mr. Ambrosio and a AAA employee. Mr. Degolyer explained that the function of AAA was to support management during a

disruptive situation or an altercation; to detect and deter by separating the parties without subjecting themselves to physical harm and by calling the police, and to observe and report to management; and to provide perimeter security and prevent vandalism. According to Mr. Degolyer, he did not receive any complaints from anyone prior to this incident that there was inadequate security and he was unaware of any prior fights or altercations at the East Wind.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324 [1986], citing to *Zuckerman v City of New York*, 49 NY2d at 562).

An innkeeper is required to exercise reasonable care to protect its patrons from reasonably anticipated dangers. However, an unexpected altercation between patrons that results in injury is not a situation that could reasonably be expected to have been anticipated or prevented (*see Lee v Durow's Rest., Inc.*, 238 AD2d 384, 385, 656 NYS2d 321 [2d Dept 1997]; *Silver v Sheraton-Smithtown Inn*, 121 AD2d 711, 712, 504 NYS2d 56 [2d Dept 1986]; *see also Lindskog v Southland Rest., Inc.*, 160 AD2d 842, 554 NYS2d 276 [2d Dept 1990]). Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults (*see Cutrone v Monarch Holding Corp.*, 299 AD2d 388, 749 NYS2d 280 [2d Dept 2002]).

Here, East Wind and Knightworld demonstrated that the plaintiff was injured “as a result of a spontaneous and unexpected criminal act of a third party for which the defendant may not be held liable” (*see Cutrone v Monarch Holding Corp.*, 299 AD2d 388, 388, 749 NYS2d 280 [2d Dept 2002], *quoting Pulitano v Suffolk Manor Caterers*, 245 AD2d 279, 280, 664 NYS2d 480 [2d Dept 1997]). Based on the deposition testimony of the plaintiff and Mr. Ambrosio, the altercation and/or assault involving the plaintiff and possibly others was very brief (*see Lindskog v Southland Rest., Inc.*, 160 AD2d at 843). The circumstances of this action do not present a situation in which East Wind employees could reasonably have been expected to anticipate or prevent the unidentified individual’s assault of the plaintiff (*see Cutrone v Monarch Holding Corp.*, 299 AD2d at 388-390; *Scalice v King Kullen*, 274 AD2d 426, 426-427, 710 NYS2d 632 [2d Dept 2000]; *Pulitano v Suffolk Manor Caterers*, 245 AD2d at 280-281). Moreover, there is no evidence of any escalating situation between the plaintiff and his unidentified assailant such that East Wind’s employees should have reasonably anticipated or prevented the assault (*see Scalice v King Kullen*, 274 AD2d at 427; *Woolard v New Mohegan Diner*, 258 AD2d 578, 579, 686 NYS2d 445 [2d Dept 1999]; *Languilli v Argonaut Rest. & Diner*, 232 AD2d 375, 375, 648 NYS2d 139 [2d Dept 1996]). The plaintiff, in opposition, failed to raise a triable issue of fact as to whether East Wind knew of previous criminal activity in its ballroom and rear lobby which would make the assault foreseeable, and whether the security provided by East Wind was inadequate (*see Cameron Plocas v Best Western Hotel & Convention Ctr.*, 300 AD2d 556, 556-557, 751 NYS2d 878 [2d Dept 2002]; *Cruz v McDonald's Gutierrez Food Corp.*, 272

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AD2d 366, 366, 707 NYS2d 486 [2d Dept 2000]). The plaintiff proffered the affidavit of Michelle Faust dated May 17, 2011 in which she states that she recalled seeing several times in plain view during the Halloween party the individual in the black ninja outfit carrying what appeared to be a metal sword in a holster around his waist or holding it in his hand while walking around the ballroom between 8 p.m. and 10 p.m. Said affidavit fails to raise an issue of fact concerning the foreseeability to anyone present at East Wind that the individual in the ninja outfit would later enter into an altercation and assault someone with the sword. Therefore, East Wind and Knightworld are entitled to summary judgment dismissing the complaint and all cross claims as asserted against them (*see Cutrone v Monarch Holding Corp.*, 299 AD2d at 390).

AAA demonstrated that it owed no common-law duty to protect the plaintiff from injury nor did it assume any contractual duty to protect the plaintiff from physical injury (*see Durham v Beaufort*, 300 AD2d 435, 752 NYS2d 88 [2d Dept 2002]; *Buckley v I.B.I. Sec. Serv., Inc.*, 157 AD2d 645, 645-646, 549 NYS2d 744 [2d Dept 1990]). Nor is there any evidence that AAA's employees created a special relationship with the plaintiff or undertook a special duty upon which the plaintiff detrimentally relied (*see Marun v Sunrise Mall Assoc.*, 249 AD2d 519, 520, 671 NYS2d 337 [2d Dept 1998]). Even if it were assumed that the plaintiff was an intended third-party beneficiary of the agreement between East Wind and AAA, as the plaintiff contends in his opposition and submits AAA's security guidelines in support, it cannot be concluded that AAA could have reasonably expected, anticipated or prevented the attack upon the plaintiff (*see Moberg v New York Yankees*, 218 AD2d 731, 630 NYS2d 509 [2d Dept 1995]). Therefore, AAA is entitled to summary judgment dismissing the plaintiff's complaint and all cross claims as asserted against it (*see Abramian v Travellers Hotel Assoc. of LaGuardia*, 203 AD2d 398, 399, 610 NYS2d 310 [2d Dept 1994], *lv denied* 84 NY2d 812, 622 NYS2d 914 [1995]).

Accordingly, the motions for summary judgment by the defendants are granted and the complaint is dismissed in its entirety.

Dated: _____

9/11/2011

Hon. Denise F. Molla

 J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION