

Inzerillo v Maritime Hotel Corp.

2011 NY Slip Op 32735(U)

August 29, 2011

Supreme Court, New York County

Docket Number: 119048/2006

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

Justice

Index Number : 119048/2006
INZERILLO, STEVEN
vs.
MARITIME HOTEL CORP.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

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

SEP 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Aug 23 2011

[Signature]
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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
Steven Inzerillo and Jennifer Inzerillo,

Plaintiff (s),

-against-

Maritime Hotel Corporation, Maritime Hotel,
Hiro Ballroom at the Maritime Hotel,
Market Corner Realty Associates LLC,
River Inn, Hudson River Inn d/b/a
Maritime Hotel Corporation, Niche Media and
Gotham Magazine,

Defendant (s).

-----X

Maritime Hotel Corporation, B.D. Stanhope LLC
d/b/a Hiro Ballroom & Lounge s/h/a
"Hiro Ballroom at the Maritime Hotel,"
Hudson River Inn LLC, Market Corner
Realty Associates LLC, River Inn and
Hudson River Inn LLC d/b/a Maritime Hotel
s/h/a "Hudson River Inn and
Hudson River Inn d/b/a Maritime Hotel"

3rd Party Plaintiffs

-against-

NEC Security,

3rd Party Defendants.

-----X

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

<u>Papers</u>	<u>Numbered</u>
<u>Motion Seq. 002</u>	
Niche and Gotham n/m (CPLR 3212) w/RCP affirm, exhs	1
Inzerillo's opp w/AJH affirm	2
NEC opp w/PK affirm	3
Niche and Gotham reply	4

DECISION/ORDER

Index No.: 119048-06

Seq. No.: 002, 003, 004

PRESENT:

Hon. Judith J. Gische

J.S.C.

Third Party Index No.
590399-08

FILED

SEP 01 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Motion Seq. 003

Maritime's n/m (3212) w/PDL affirm, exhs	5
Inzerillo's opp w/AJH affirm, SI affid, exhs	6
NEC opp w/PK affirm	7

Motion Seq.004

Maritime's Amended n/m (3212) w/PDL affirm, GM affid, exhs	8
Inzerillo opp w/AJH affirm, exhs	9
NEC opp w/PK affirm	10

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

This is a negligence against a hotel, the hotel's owner, and the hotel's food and beverage service division (collectively "Maritime"). The sponsors ("Niche" and "Gotham") of a "meet and greet" event held at the hotel have also been sued. Plaintiff Steven Inzerillo ("Inzerillo" sometimes "plaintiff") claims he was attacked and beaten by security personnel who were assigned to the event he attended. Issue was joined and the note of issue was filed by plaintiff on September 16, 2010. Jennifer Inzerillo, Steven's wife, has asserted a derivative claim for loss of services.

There are three motions before the court. Two of the motions (motion sequences 3 and 4) are by the Maritime defendants. Motion sequence no. 3, for summary judgment ("original motion") is, admittedly, untimely. In bringing motion sequence no. 4 ("amended motion"), however, Maritime hopes that the court will find it has shown "good cause" for why the untimely motion should be heard. Maritime readily acknowledges that the original motion was not served until January 18, 2011. For the motion to have been timely, it should have been served no later than Friday, January 14, 2011, that being 120 days from the filing of the note of issue. Inzerillo and NEC are opposed to having the court consider the original motion on the basis that it is

time barred and that Maritime has not shown good cause for why it is untimely.

According to Maritime's lawyer, the original motion was timely prepared, signed and ready to be mailed to plaintiff and co-defendants. The attorney turned over the papers to his paralegal for them to be served by regular mail which is how Niche and Gotham's motion was served on him. The paralegal, however, caused the motion to be served untimely because she missed the daily mail run that would have had the letter postmarked that day (i.e. on January 14, 2011). This resulted in the motion papers sitting in the mailing room until the next business day, which was Monday, January 18th. Neither the attorney nor the paralegal realized what had happened until Maritime received opposition to its motion raising the defense untimeliness. The paralegal has provided her sworn affidavit, describing these events and, in effect, accepting responsibility for the administrative error.

CPLR § 3212 [a] requires that a motion for summary judgment be made no later than 120 days of the note of issue being filed, "except with leave of court on good cause shown" (Micelle v. State Mutual Auto Ins Co., 3 NY3d 725 [2004]; Brill v. City of New York, 2 NY3d 725 [2004]). No excuse at all or a perfunctory excuse cannot be "good cause" (Brill, *supra* at 652). CPLR § 3212 [a] is not so unyielding, however, that an "excellent" excuse has to be offered for the delay, rather there has to be a "satisfactory explanation for the untimeliness" (*Id.*) The court has considerable discretion in determining whether there is "good cause" shown for a delay in the making of the motion (Fofana v. 41 W34th St., 71 AD3d 445 [1st Dept 2010]; Filianno v. Triborough Bridge and Tunnel Authority, 34 AD3d 280 [1st Dept 2006]). Thus, in deciding whether there is "good cause" the court should not lose sight of why cases

such as Brill and its progeny came to be. They were intended to stem the tide of "11th hour" motions for summary judgment which often disrupted calendars and delayed trials.

Here, the attorney for Maritime did everything right and, but for the simple act of having the original motion papers delivered to its mail department too late in the day, the original motion would have been timely served. It was only late by one business day and there is no indication (or argument presented) that Maritime intended to flout the requirements of CPLR § 3212 [a] or was cavalier about the deadline. Arguments by plaintiff, NEC and Niche/Gotham that Maritime's tardiness is inexcusable set the bar too high. Significantly, the attorney himself did not delay in having the motion ready and prepared for service in a timely manner. Consequently, the court finds good cause for Maritime's original motion to be considered notwithstanding its tardiness. Therefore, the amended motion is granted to the extent that the original motion will be considered on the merits along with the by Niche and Gotham for summary judgment. The motions are hereby consolidated for determination in this decision/ order.

Facts, Claims and Arguments Presented

Inzerillo claims that while attending an event at the Maritime Hotel on January 25, 2006 he was the victim of an unprovoked attack and beating by a member of defendants' security staff. The Maritime defendants have brought a third party action against NEC for common law indemnification, contribution and judgment over. Inzerillo has not amended his complaint to assert a direct claim against NEC. In his complaint, Inzerillo alleges that Maritime provided training for the security staff and directed and controlled the manner in which NEC was required to act and behave while providing

security at the hotel. He also claims that the other named defendants either exercised or had control over NEC and how its staff executed their duties. Thus, Inzerillo argues the defendants owed him a duty of care which they breached.

According to Inzerillo, he, his older brother, Robert and two friends, Chris Hollander and Greg Pecker, attended an event at the Hiro Ballroom in the Maritime Hotel for which they had tickets. The event was a "meet and greet" at which several members of the New York Rangers hockey team were present. Inzerillo testified that although he had two beers at the event, he had no other alcoholic beverages that day.

While at the event he was told by security personnel he could not sit at one of the tables so he and his group got up and moved. They sat at another table and were asked to get up and leave the ballroom altogether. Inzerillo claims he and his group gathered their belongings and were on their way out when someone called security on their radio. He could hear a female voice telling the guards "don't throw him out, let him back in." Both incidents involved the same two security guards, one of whom has since been identified as Kevin Alexander ("Alexander"), the Director of Operations for NEC.

Inzerillo returned to the ballroom where he remained for some time and proceeded to collect some of the players' autographs. As he was talking to one of the players, he was told by Alexander that he had to leave. It was at this point, according to Inzerillo, that Alexander grabbed him from behind and started pushing him towards the stairs. Plaintiff has testified he was "thrown up [and] down the stairs, kneed in the back, choked to the point that [he] couldn't breathe..." Chris, Inzerillo's friend, called 911 and the police responded. Plaintiff was handcuffed by the police, tied to a spinal board and then the EMT's who had also arrived at the same time, put him into an ambulance.

Inzerillo contends he sustained injuries to his knee, elbows, head, shoulder, back.

Maritime seeks summary judgment based on arguments that the incident did not occur as plaintiff alleges, but even if it did, the Maritime defendants are not legally responsible for any acts taken by NEC because it is an independent contractor. Alternatively, its seeks indemnification by NEC. The motion by Maritime is opposed by NEC, Niche and Gotham. Niche and Gotham have also moved for summary judgment on the basis that it owed no duty to plaintiff because Maritime provided the security for the event, Niche and Gotham had no contractual obligation to, nor did it undertake any duty to, provide security for the event. Inzerillo opposes Niche and Gotham's motion as does NEC.

The Director of Operations for the Hiro Ballroom ("Rodrigues") was deposed on behalf of Maritime. He testified that NEC has a security services contract with Maritime and that pursuant to that contract, executed April 27 2005 ("security services contract"), NEC provides its own security staffing, sets the schedules for the staff and assigns shifts. When asked whether Maritime provides any training for the security staff, Rodrigues responded: "Yes . . . training on how to deal with customers, training on their uniforms, training on how to use the radios, training on where the fire exits are, where fire extinguishers are, emergency exits. There is a list, those are the main things." Rodrigues also testified, however, that in terms of having someone removed from the premises, Maritime's moto is "just resolve the situation without any violence and we talk - they've been trained to talk their way out of situations."

Alexander, the security officer involved in the incident, was also deposed on behalf of NEC. He testified at his deposition that Inzerillo had been rude to him as soon

as he came into the ballroom and that once inside, Inzerillo started bashing into other guests around him and heckling and intimidating some of the players so that they were made to feel uncomfortable. Alexander stated that Inzerillo appeared to be intoxicated. Alexander also testified that later someone he could only identify as a "a blond lady" from Gotham, asked him to remove Inzerillo. Alexander and the other guard ("Montero") complied and instructed Inzerillo he had to leave. According to Alexander, he, Montero and Inzerillo walked out single file with Montero in front of Inzerillo and Alexander behind him. It was at this point, according to Alexander, that Inzerillo threw himself on the floor of the landing in the stairs and proceed to throw a temper tantrum. Alexander described Inzerillo as yelling and screaming that he was not going to leave, flailing his arms and legs, kicking both feet and waving his hands.

Alexander testified at his deposition that someone from Gotham saw this and insisted that Inzerillo be picked up and thrown out, but Alexander called 911 instead and proceeded to make a little barrier around plaintiff with Montero so other guests would walk around him.

Maritime's Special Events Coordinator ("Paschall") was also deposed. Paschall was an eyewitness who was present for most, if not all, the incident alleged. Paschall testified that as she was talking to another guest near the stairs, she saw Inzerillo being led out by security. Inzerillo was yelling and then flailing about on the floor. His friend was at the top of the stairs yelling at Inzerillo to "get up." Paschall did not see anyone "knee" plaintiff, restrain him or otherwise touch him. Paschall thought that Inzerillo may have been intoxicated because of how he was slurring his words.

In support of their motion for summary judgment, Niche and Gotham also rely on

Paschall's deposition testimony that the Maritime defendants were responsible for and did provide security for the event. Niche and Gotham maintain that they were only responsible for advertising, promoting and sponsoring the event.

NEC, in opposition to Niche and Gotham's motion, states that certain acts by Niche and Gotham employees were the actual proximate cause of Inzerillo's injuries. NEC relies on the depositions testimony by Cathy Nelson ("Nelson"), Gotham's employee. Nelson testified that Inzerillo and two of his friends "ran" past her and snuck in. Nelson was not sure whether Inzerillo was on the guest list, but an NEC security officer was standing next to her when this occurred. Nelson also reported the incident to her national sales rep. NEC claims that someone instructed the NEC security officers to let plaintiff back into the ballroom as he being escorted out the first time. According to NEC, those instructions came from someone associated with Gotham. Thus, NEC claims that had he been removed the first time, none of this would have happened. Inzerillo adopts these arguments and claims there is a triable issue of fact whether the Maritime defendants controlled NEC's staff and whether Niche and Gotham's instructions to let him back in proximately caused his accident. Inzerillo claims no defendant should be let out of this case.

Law Applicable to Motions for Summary Judgment

On a motion for summary judgment, the movant 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]]. Once met, this burden shifts to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's

papers to 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

It is well established law that the employer of an independent contractor is not liable for injury caused to a third party by an act or omission by that independent contractor or the independent contractor's employees (Wright v. Esplanade Gardens 150 A.D.2d 197 [1st Dept 1989]). Here, no conflicting proof is presented that NEC was an independent contractor. The issue here is whether Maritime controlled the security guards and, if so, whether such control gives rise to an employer-employee relationship exposing Maritime to vicarious liability for the actions allegedly taken by NEC against Inzerillo.

It is clear from NEC's security services contract that NEC decides how much security is needed for each event. Maritime is required to provide NEC with advance notice of such events so NEC can make sure to adjust its officer's schedule to insure there is enough coverage for them. NEC provides its own radio equipment and if such equipment is lost or broken, the security officer bears the costs of thereof. Pursuant to the "termination clause" in the contract, if the contract is terminated, the client cannot use any NEC officer for a period of two years following such termination and during the life of the contract, Maritime is free to use any other security firm it chooses for that an event but that during that event, NEC's insurance is suspended.

Although Rodrigues testified that Maritime trained security personnel, the kind of training he refers to is of a general nature: how to deal with guests and what to do in

case of an emergency, such as a fire. Maritime did not train the officers in security techniques. Such training was provided by NEC at monthly training events and Alexander had already obtained his officer's license by the time he started to work for Maritime. Consequently, Inzerillo's argument, that there is a question of fact as to whether the security officers involved in the incident were controlled by Maritime (i.e. really a Maritime employee), is not supported by this record. Maritime has proved that, as a matter of law, it is not liable for any injury that may have been caused to Inzerillo as a result of an act or omission by its independent contractor or the independent contractor's employees.

There is no evidence that plaintiff, as argued by NEC, showed signs of being "overly" intoxicated, or that he was served drinks at the event while intoxicated. Therefore, NEC's assertion that plaintiff's injuries were proximately caused alcohol served to him while at the event is wholly conjectural. In any event, Inzerillo has not stated a claim under the Dram Shop Act against any of the defendants nor would such a claim have been successful. It is well-established law that there is no private common law right of action against a tavern owner for the service of intoxicating beverages to voluntarily intoxicated individuals (Delamater v. Kimmerle, 104 A.D.2d 242 [3rd Dept. 1984]; Allen v. County of Westchester, 172 A.D.2d 471 [2nd Dept. 1991]; D'Amico v. Christie, 71 N.Y.2d 76 [1987]). While General Obligation Law §11-101 (the Dram Shop act) establishes that a standard of care exists between alcohol providers and third parties who are foreseeably injured by persons to whom liquor is served, there are no cases extending that duty to the intoxicated person him or herself (Qursler v. Brennan, 67 A.D.3d 36 [4th Dept. 2009]; Fink v. Le Pays Basque, Inc., 2011 WL

1212718 [Supt Ct., NY Co. 2001] *and cases cited therein*).

Arguments by NEC that because "the hotel" directed Alexander to pick the plaintiff up off the floor and "throw him out," the Maritime defendants took on responsibility for security, are rejected. Not only is this statement based upon inadmissible hearsay but, even if this statement was in fact made, it has not been directly attributed to anyone associated with the hotel. In any event, Alexander testified he did not heed those instructions and instead called the police. Therefore, that statement, even if it could be proved at trial, does not support a claim that the Maritime defendants supplanted NEC's role as club security by instructing the officers to physically remove Inzerillo.

Maritime has proved that: 1) it hired NEC to perform security; 2) NEC was an independent contractor and; 3) Maritime did not train, instruct or otherwise control NEC or supplant NEC's role as the security provider for this event. Those opposing the motion have failed to raise triable issues of fact that Maritime breached some duty or caused or contributed to the incident. Therefore, Maritime's motion for summary judgment is granted and all the claims against Maritime are dismissed. Maritime's motion for summary judgment (in the alternative) on its claim for common law indemnification against NEC is denied and that cross claim is hereby severed and dismissed.

Niche and Gotham have established that they were solely responsible for sponsoring, advertising and promoting the event Inzerillo attended. They have also proved they did not have (nor did they assume) any responsibility for security at the event. Thus, Niche (Gotham) did not owe a duty to plaintiff to keep him safe and

secure (Villa v. Paradise Theater Productions, Inc., 2009 WL 3697028, 2009 N.Y. Slip Op. 32516(U) [Sup Ct., NY Co. 2009] *aff'd* Villa v. Paradise Theater Productions, Inc., 85 A.D.3d 402 [1st Dept. 2011]). There is no evidence that anyone from Gotham or Niche directed or controlled the security for the event. Niche was not contractually obligated to provide security. Even if, as NEC claims, someone associated with Niche or Gotham allowed Inzerillo to sneak into the event (he apparently had tickets anyway), the issue is not whether Inzerillo was properly allowed access to the event, but whether any defendant acted in a negligent manner when the need to remove him arose. No triable issue of fact is raised that anyone associated with Niche or Gotham touched the plaintiff. Therefore, Niche and Gotham have proved that they did not have nor did they assume a duty to Inzerillo and, thus their entitlement to summary judgment as a matter of law. The motion by Niche and Gotham is granted and all claims against them are severed and dismissed.

Conclusion

It is hereby,

ORDERED that the motion by defendants/third party plaintiffs Maritime Hotel Corporation, B.D. Stanhope LLC d/b/a Hiro Ballroom & Lounge s/h/a "Hiro Ballroom at the Maritime Hotel," Hudson River Inn LLC, Market Corner Realty Associates LLC, River Inn and Hudson River Inn LLC d/b/a Maritime Hotel s/h/a "Hudson River Inn and Hudson River Inn d/b/a Maritime Hotel" for summary judgment is granted; the complaint and all other claims against them are hereby dismissed; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants/third party

plaintiffs Maritime Hotel Corporation, B.D. Stanhope LLC d/b/a Hiro Ballroom & Lounge s/h/a "Hiro Ballroom at the Maritime Hotel," Hudson River Inn LLC, Market Corner Realty Associates LLC, River Inn and Hudson River Inn LLC d/b/a Maritime Hotel s/h/a "Hudson River Inn and Hudson River Inn d/b/a Maritime Hotel" against plaintiffs Steven Inzerillo and Jennifer Inzerillo dismissing the complaint and all other claims against them; and it is further

ORDERED that the motion by defendants/third party plaintiffs Niche Media Holdings LLC and Gotham Magazine for summary judgment is granted; the complaint and all other claims against them are hereby dismissed; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants/third party plaintiffs Niche Media Holdings LLC and Gotham Magazine against plaintiffs Steven Inzerillo and Jennifer Inzerillo dismissing the complaint and all other claims against them; and it is further

ORDERED that the motion by defendants/third party plaintiffs Maritime Hotel Corporation, B.D. Stanhope LLC d/b/a Hiro Ballroom & Lounge s/h/a "Hiro Ballroom at the Maritime Hotel," Hudson River Inn LLC, Market Corner Realty Associates LLC, River Inn and Hudson River Inn LLC d/b/a Maritime Hotel s/h/a "Hudson River Inn and Hudson River Inn d/b/a Maritime Hotel" for summary judgment against third party defendant NEC Security for common law indemnification is denied for the reasons stated and the third party action is severed and dismissed; and it is further

ORDERED that this since there are no remaining defendants and the third party action has been dismissed, this action is hereby dismissed in its entirety; and it is

further


ORDERED that any relief requested not expressly addressed is hereby denied;

and it is further

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

Dated: New York, New York
August 29, 2011

So Ordered:



Hon. Judith J. Gische, JSC

FILED

SEP 01 2011

**NEW YORK
COUNTY CLERK'S OFFICE**