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

PRESENT : DONNA M. MILLS **PART 58**

Justice

NEIL EVERTSEN,

Plaintiff,

-v-

41 EAST 58TH STREET CORP., et al.,

Defendants.

INDEX NO. 117437/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits-- Exhibits	4, 5
Replying Affidavits	

CROSS-MOTION: ✓ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

DEC 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/28/11

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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NEIL EVERTSEN,

Plaintiff,

-against-

41 EAST 58TH STREET CORP., et al.,

Defendant.

----------x

Index No.

117437/09

DONNA MILLS, J. :

Defendants Classic Security LLC and Classic Security (hereinafter "Classic") move for an Order dismissing the amended complaint and all cross-claims against it pursuant to CPLR 3211 (a)(1) on the grounds that a defense is founded upon documentary evidence, and pursuant to CPLR 3211 (a)(7) on the grounds that the plaintiff failed to state a cause of action against them. Defendants SL Green Realty Corp., SL Green Operating Partnership, L.P., SL Green Leasing LLC, and SL Green Management LLC (hereinafter collectively referred to as "SLC") cross-moves for an Order granting summary judgment pursuant to CPLR 3212 in its favor, or in the alternative permitting it to amend its Answer to interpose cross-claims.

This is a claim for personal injury sustained by plaintiff, when he attended a New Years Eve celebration at "The Grand" night club/lounge located at 41 East 58th Street, New York, New York. This incident occurred during the late evening hours of December 31, 2006 and the early morning hours of January 1, 2007. During that time frame, an altercation had occurred inside the club when a friend of plaintiff was allegedly struck in the back of the head with a bottle. Security personnel inside the club either escorted or

directed plaintiff and a number of people out of the premises to the front of the building, which is owned by SLG. Plaintiff contends that while he and others were gathered outside of the club, and in front of the SLG building, he was negligently struck by one of the security personnel working at the Grand's New Years Eve celebration.

Plaintiff has alleged that SLG had a duty, and obligation to confirm that safe, proper, and non-violent situations were on-going at the premises in question; that SLG as owner of the building failed to provide proper security crowd control and failed to oversee and supervise the activities of security personnel for the building and its tenants. Plaintiff has also alleged that Classic was negligent in allowing its employees or agents to assault him that night.

Defendant, Classic acknowledges that it had a written agreement with SLG to provide security services to buildings owned by SLG. Classic however disputes having any responsibility for the subject building in question, and relies on the agreement between itself and SLG, which specifies which properties Classic was to provide security. The document apparently does not list 41 East 58th street nor the Grand on the list. As such, Classic argues that the documentary evidence clearly establishes that it did not have any agreement or involvement with 41 East 58th Street or The Grand, and did not provide security to either. Additionally, Classic maintains that the Grand employed its own bouncers, security personnel and crowd control personnel and it did not hire, employ, train, supervise, direct or control any Grand employees.

A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims

as a matter of law (see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Put differently, the documentary evidence must "resolv[e] all factual issues as a matter of law and conclusively dispose of the plaintiff's claim" (Paramount Transp. Sys., Inc. v Lasertone Corp., 76 AD3d 519, 520 [2010]).

Inasmuch as the defendant Classic has met its burden, that burden then shifts to the plaintiff, the non-moving party, to raise an issue of fact. See, Hunt v. Kosterelis, 27 AD3d 1178 (4th Dept. 2006). The plaintiff has sufficiently demonstrated that the defendants' documentary evidence is not sufficient to completely refute the factual allegations raised by the plaintiff. Here, the SLG building incident report which was submitted as exhibit "G" of SLG's cross-motion, was reported by Thomas Macaluso of defendant Classic. This document clearly lists Classic as one of the security companies that was involved in the investigation of this incident outside of SLG's premises.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law [,] a motion for dismissal will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wooton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and

as a matter of law (see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Put differently, the documentary evidence must "resolv[e] all factual issues as a matter of law and conclusively dispose of the plaintiff's claim" (Paramount Transp. Sys., Inc. v Lasertone Corp., 76 AD3d 519, 520 [2010]).

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determine whether they fit within any "cognizable legal theory." Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001).

Applying these standards, this Court cannot conclude that the allegations in the complaint, taken as true, fail to state any cognizable cause of action against the moving defendants. Or that the documentary evidence submitted by those defendants conclusively disposes of the plaintiff's causes of action.

With respect to SLG's cross-motion for summary judgment, "[u]nder CPLR 3212 (f), 'where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied . . . . This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion' " (Juseinoski v New York Hosp. Med. Ctr. Of Queens, 29 AD3d 636, 637 [2006], quoting Baron v Incorporated Vil. of Freeport, 143 AD2d 792, 792-793 [1988]). As such, SLG's cross-motion appears to be premature at this time because questions of fact exists as to the involvement and responsibility of SLG, before, during and after the subject incident. In light of the fact that no discovery has been exchanged nor conducted, summary judgment would be premature at this time.

Accordingly, it is

ORDERED that defendant Classic's motion to dismiss is denied; and it is further

ORDERED that defendant SLG's cross-motion for summary judgment is denied; and it is further

ORDERED that defendant SLG is granted leave to serve an amended answer to

interpose cross-claims within twenty days after service on plaintiff's attorney of a copy of this order with notice of entry.

DATED: 11/25/11

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.