

Kekovic v 13th St. Entertainment LLC

2012 NY Slip Op 33133(U)

June 14, 2012

Supreme Court, New York County

Docket Number: 116636/09

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

AM

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 116636/2009
KEKOVIC, SINISA
vs.
13TH STREET ENTERTAINMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

decided per the memorandum decision dated _____
which disposes of motion sequence(s) no. 002 + 003

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

FILED

JUN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

JUN 18 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 6/14/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

SINISA KEKOVIC,
Plaintiff,

Index No.: 116636/09

- against-

13TH STREET ENTERTAINMENT LLC D/B/A KISS
& FLY NIGHTCLUB,
Defendant.

DECISION AND ORDER

-----X

13TH STREET ENTERTAINMENT LLC D/B/A KISS
& FLY NIGHTCLUB,
Third-Party Plaintiff,

- against-

ALL SEASON PROTECTION SERVICES, INC.,
Third-Party Defendant.

-----X

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Papers considered in review of these motions for summary judgment:

Notice of Motion/Aff in Support	1
Notice of Motion/Aff in Support	2
Affs in Opp	3, 4, 5
Reply Affs	6, 7, 8

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant 13th Street
Entertainment LLC d/b/a Kiss & Fly Nightclub ("13th Street") moves for summary

judgment dismissing the complaint and for summary judgment on its third party complaint. Third-party defendant All Season Protection Services, Inc. (“All Season”) moves for summary judgment dismissing the third-party complaint or, in the alternative, to amend its answer.

On September 20, 2009, plaintiff Sinisa Kekovic (“Kekovic”) was a customer at 13th Street’s Kiss & Fly Nightclub when he sustained personal injuries after being struck on the head with a bottle of vodka by an unknown assailant. Kekovic commenced this action seeking to recover damages for the injuries he sustained, alleging, *inter alia*, a violation of General Obligations Law §11-101 (“Dram Shop Act”).¹

13th Street then commenced a third-party action against All Season, a security company it retained to provide security services at the nightclub pursuant to a letter acknowledgment dated December 2, 2007 (“first agreement”) and thereafter, a security services contract executed in November 2010 (“second agreement”). Only the second agreement contained indemnification clauses. 13th Street alleged claims for contribution, contractual indemnification and common law indemnification.

13th Street now moves for summary judgment dismissing the complaint and for summary judgment on its third-party complaint and All Season moves for summary judgment dismissing the third-party complaint, or, in the alternative to amend its answer to include a counterclaim for contractual indemnification.

¹ Any other claims asserted by Kekovic have been abandoned.

13th Street argues that it can not be held liable under the Dram Shop Act because Kekovic can not identify his assailant. Kekovic testified that he did not know where the bottle came from, he did not see the bottle that he was hit with before the incident, he did not see anyone holding a bottle prior to the incident, and there is no evidence that 13th Street served the alleged assailant while he or she was visibly intoxicated. Further, even though Kekovic described the three males sitting at the table next to his table as “loud and boisterous,” such does not meet the standard of visible intoxication so as to be held liable under the Dram Shop Act.

With regard to its claims for indemnification asserted in its third-party complaint, 13th Street first maintains that although it signed the second agreement (which contained indemnification clauses) after Kekovic’s incident, 13th Street and All Season intended the agreement to have retroactive effect beginning March 6, 2008. 13th Street submits the affidavit of its director of operations Ryan Tarantino (“Tarantino”), who provided that he intended the second agreement to apply retroactively as of March 6, 2008. As such, the indemnification clauses in the second agreement were in effect at the time of the incident. 13th Street also contends that it is entitled to common law indemnification because it did not maintain any direction or control over security and argues that All Season breached its obligation to procure insurance naming 13th Street as an additional insured. 13th Street argues that it is entitled to payment for all past and future costs and fees associated with the defense of this action.

In opposition to 13th Street's motion, Kekovic argues that issues of fact exist as to whether 13th Street violated the Dram Shop Act, based on Kekovic's examination before trial testimony that (1) there was a group of three men sitting at the table next to Kekovic who Kekovic observed as being extremely loud and boisterous for one and a half hours; (2) a waitress employed by 13th Street provided the three men with bottle service at their table, supplying them with several bottles of vodka; (3) the three men at the table next to Kekovic were "wasted" ; and (4) one of the men from that table was believed to be his attacker based on the fact that Kekovic's back was to that table when he was clubbed from behind with a bottle of vodka and that Kekovic's friends, who were with him that night, told him that it was a Spanish or African-American man seated at the table next to them who struck him.

In support of its motion and in opposition to 13th Street's motion, All Season first argues that 13th Street improperly bases its arguments in support of its claim for contractual indemnification on the language contained in the second agreement because that second agreement was not referenced anywhere in 13th Street's pleadings. Rather, the third-party complaint and bill of particulars refer only to the first agreement. In any event, the second agreement was not in effect at the time of the subject incident. While Tarrantino maintains that he intended the agreement to be in effect as of March 6, 2008, there is no indication or evidence that All Season intended the agreement to have such retroactive effect or that any course of conduct demonstrated same. Rather, All Season

believed that it was operating under the first agreement, until the second agreement became effective, which only occurred when it was executed in November 2010. Furthermore, even if the second agreement was in effect, the indemnification clause was not triggered because (1) the attack was unrelated to any services provided by All Season at the time of the incident; (2) All Season did not violate any warranties, representations or covenants under the agreement; and (3) Kekovic did not assert any claims of negligence against All Season.

All Season also argues that the common law indemnification claim must be dismissed because it provided adequate security, there was no evidence that it was negligent in any other way, and the attack was spontaneous and unforeseeable. Finally, All Season submits an insurance policy covering the period from June 11, 2009 through June 11, 2010, and explains that contrary to 13th Street's contention, it did procure an insurance policy naming 13th Street as an additional insured.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then 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).

General Obligations Law §11-101, the "Dram Shop Act" states:

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.

To establish a prima facie case of liability, a plaintiff has the burden of presenting sufficient proof to lead to the reasonable conclusion that, an establishment sold or provided intoxicating alcohol to a third party while on notice that the third party was already "actually or apparently, under the influence of liquor." *Senn v. Scudieri*, 165 A.D.2d 346, 350 (1st Dept. 1991). Proof of visible intoxication can be shown by circumstantial evidence, including expert and eyewitness testimony. However, speculative and conclusory assertions are insufficient to raise an issue of fact with respect to this claim. *Kelly v. Fleet Bank*, 271 A.D.2d 654, 655 (2d Dep't 2000); *Conrad v. Bayside Bowling & Recreation Centre*, 209 A.D.2d 467 (2nd Dept. 1994).

Here, the Court finds that Kekovic cannot establish whether his attacker was actually or apparently intoxicated. Kekovic was unaware of the identity of the individual who struck him with a bottle from behind. Even if the attacker was one of the individuals seated at the table next to his, Kekovic's blanket observations concerning the bottles on the table and the boisterous behavior of the men seated there are too generalized to form the basis for this claim. Kekovic would be speculating about the conduct and demeanor

of each individual at the table, even if the group as a whole appeared loud, boisterous and “wasted.” Furthermore, while Kekovic maintains that his friends who were with him that night told him that his attacker was Spanish or African American, none of those friends provided an affidavit, examination before trial testimony or any other evidence sufficient to raise an issue of fact as to the identity and/or visible state of intoxication of the specific attacker. There is no other evidence before the Court concerning the identity, appearance or demeanor of the individual who struck Kekovic. Accordingly, Kekovic’s complaint is dismissed.

Consequently, the third-party action is also dismissed as a necessary consequence of dismissing the complaint in its entirety and All Season’s request to amend the third-party complaint is denied as moot. *Turchioe v. AT&T Communs.*, 256 A.D.2d 245 (1st Dept. 1998). The court notes, however, that with regard to the third-party complaint, contrary to 13th Street’s contention, the evidence presented does not establish, as a matter of law, that the second agreement, executed in November 2010 (which contained indemnification clauses), was in effect as of March 6, 2008 and that the parties intended that it apply retroactively as of that date. *See generally Temmel v. 1515 Broadway Assocs., L.P.*, 18 A.D.3d 364 (1st Dept. 2005); *Pena v. Chateau Woodmere Corp.*, 304 A.D.2d 442 (1st Dept. 2003). While Tarantino indicates that he intended the second agreement to apply retroactively, no evidence has been presented to establish that both parties shared that intention.

In any event, even if the second agreement was in effect, indemnification was not triggered. Pursuant to the second agreement, All Season agreed to indemnify 13th Street (1) from all claims, including reasonable attorneys fees, in connection with loss of life, personal injury and/or damage to property arising from or out of the provision of security services by All Season; (2) in connection with All Season's breach of any warranties, representations or covenants contained in the second agreement; or (3) from all claims of negligence or intentional acts or omissions of All Season at the nightclub. Kekovic alleges that his injuries occurred because someone at 13th Street served alcohol to an intoxicated patron. Kekovic's alleged injuries did not implicate any actions, omissions, or breaches on the part of All Season and therefore, the indemnification clause was not triggered. Therefore, 13th Street's claim for contractual indemnification is dismissed.

Further, 13th Street claims that All Season failed properly to procure insurance in accordance with its obligation to do so in the first agreement, because the insurance policy does not specifically list 13th Street as an additional insured, rather it is blanket endorsement for additional insureds. 13th Street fails to provide any support for its argument that it needed to be specifically named in the insurance policy, rather than being covered under a blanket endorsement, and the court finds that the blanket endorsement was sufficient to satisfy All Season's obligation to procure insurance under the first agreement. *See Perez v. Morse Diesel Int'l, Inc.*, 10 A.D.3d 497 (1st Dept. 2004); *Samaroo v Patmos Fifth Real Estate, Inc.*, 32 Misc. 3d 1209A (Sup. Ct., Kings Co. 2011).

Finally, 13th Street's claims for contribution and common law indemnification are dismissed. In the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law. *See Correia v. Professional Data Mgmt., Inc.*, 259 A.D.2d 60 (1st Dept. 1999). Here, there is no evidence that All Season contributed to the causation of Kekovic's injuries in any way.

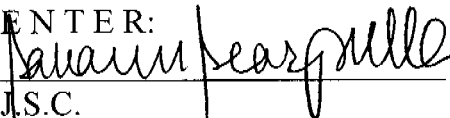
In accordance with the foregoing, it is hereby

ORDERED that defendant 13th Street Entertainment LLC d/b/a Kiss & Fly Nightclub's motion for summary judgment dismissing the complaint and for summary judgment on its third-party complaint is granted only to the extent that the complaint is dsmissed; and it is further

ORDERED that third-party defendant All Season Protection Services, Inc.'s motion for summary judgment dismissing the third-party complaint is granted and the third-party complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: New York, New York
 June 14, 2012

ENTER:

J.S.C.