Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Renee Daly, Barbara Hutchinson Dunbar, Stephanie Batra, Tricia Joseph, Keturah Joseph Morgan, and Sharon Davis,

Plaintiffs,

- against -

The City of New York, The New York City Police Department, Irie Jamboree Media Group, Irie Jam Radio, Inc., Irie Jamboree Inc., Black Emperor Entertainment, Inc., Southern Queens Park Association, Inc.,

Defendants.

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Index Number: 23363/09

Motion Date: 2/1/13

Motion Cal. Number: 13

Motion Seq. No.: 8

The following papers numbered 1 to 10 read on this amended motion by defendants, Irie Jamboree Media Group, Inc., Irie Jam Radio, Inc., Irie Jamboree Inc. (the Irie defendants) and the City of New York (sued herein as the City of New York and the New York City Police Department), for summary judgment.

	Papers Numbered
Amended Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibits.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the Irie defendants and the City for summary judgment dismissing the complaint against them is denied.

Plaintiff allegedly sustained injuries as a result of being trampled at a crowded outdoor concert at Roy Wilkins Recreation Center in Queens County on August 31, 2008. The concert, an all-day reggae concert, was organized, managed and produced by the Irie defendants.

Plaintiff testified in her deposition that Roy Wilkins Recreation Center is a large, open field containing a stage and a large TV monitor. She had attended this concert for the five

previous years. She arrived at approximately 2:00 p.m. with a friend. The incident occurred at approximately 9:00 p.m. There were approximately four security personnel collecting tickets and performing searches at the line she was standing in to enter. She also recalls that there were security guards inside the venue and an ambulance by the stage. She also testified that she moved about throughout the day. She did not recall any disturbances before the subject incident. She testified that it was crowded and she had a foot or more of distance around her. She testified that the field became steadily crowded from 5:00 - 8:00 p.m. and estimated that the number of concert-goers had grown to approximately 20,000. She was a few hundred feet from the monitor when the incident occurred. A reggae performer named "Mavado" was performing. At the time of the incident, she looked to her right and saw a "sea" of people coming toward her. She did not know how many, but guessed, "Hundreds. I don't know." She did not know where the people were running from or what caused the incident, and she did not hear any noise. A "split second" elapsed from the time she saw this crowd of people coming toward her until the time she was knocked down and trampled. She did not see anyone try to control the swarm of people.

Robert Clarke, CEO of Irie Jam Radio, testified in his deposition that he obtained a permit for the event from the Southern Queens Park Association and the New York City Department of Parks and Recreation. He also coordinated with the NYPD in planning the event, including one Inspector Johnson. He expected in excess of 5,000 people. He testified that he hired two to three security companies to handle the security for the event and that there were approximately 100-154 security personnel present providing security for the entrances, stage, ticket booths and the crowd. Every person who entered the park was searched by security personnel. He also testified that he exceeded the number of security personnel that the NYPD told him was required. Moreover, there were community affairs officers from the NYPD in the park.

Clarke also testified that he noticed an altercation between two women in front of the stage culminating in one pushing the other. He stated that one woman fell, causing "a ripple effect". Other people began to fall backward and some people who heard the commotion began to run. The entire incident lasted approximately 10 seconds. He also stated that the injured person was 10 feet away from the stage. Security also went in and aided people who were getting up. Clarke indicated that he was not aware of any weapons in the incident and that no punches were thrown.

Lieutenant Kristel Johnson, commanding officer of the 113th Police Precinct in Queens County on the date of the incident, testified in her deposition that she learned of the proposed concert months earlier when she received a list of proposed events from the Southern Queens Parks Association. Irie's permit

application was submitted to her for review. The application set forth the number of spectators as 5,000+. She stated that she had the power to veto the granting of a permit for a proposed concert but had no reason to cancel the concert in question. She stated that Irie was responsible for people entering the park and the NYPD made sure that vehicular and pedestrian traffic ran smoothly. Lt. Johnson also testified that there were approximately 104-105 police officers assigned to the concert, but none were assigned to be inside the park. They were all on the sidewalk outside the park and at the entrances. She was only aware of one injury during the event. No one was arrested during the event. There were no stabbings or gunshots reported, was unaware of any complaints other than lost property and did not know what caused the incident in question. Moreover, in the three years she has been involved with this event, she is unaware of any crimes taking place at the event. After the incident, she advised Clarke that she was shutting down the event.

Plaintiff alleges that defendants were negligent in their supervision and control of the crowd.

Although property owners and permittees are not insurers of a visitor's safety, they do have a common law duty of reasonable care under the circumstances to maintain the property in a safe condition and minimize foreseeable dangers on the property (see Maheshwari v City of New York, 2 NY 3d 288 [2004]). Not only Irie as the permittee, but the City as the owner and operator of the public park, owed a duty to the public invited to enter the park to provide adequate crowd control and supervision (see Rotz v City of New York, 143 AD 2d 301 [1st Dept 1988]).

Movants allege that they are entitled to summary judgment upon the grounds that the incident was an unforeseeable and unpreventable event and, therefore, they did not breach their duty to plaintiff. In so contending, movants' counsel argues that plaintiff's injuries were caused by a spontaneous criminal act of a third party which could not have been anticipated or guarded against, and highlights the deposition testimony of plaintiff and Lt. Johnson wherein they stated that they were unaware of any criminal activity at past concerts, and upon the deposition testimony of Clarke concerning his observation of the outbreak of an altercation between two women, resulting in the shoving of one of them. Counsel also argues that, in any event, there was no showing of inadequate security.

Counsel's arguments are without merit. The issue of foreseeability here does not concern a random criminal act but concerns crowd control. The same issue was involved in Rotz v City of New York (supra), wherein the plaintiff was trampled at a Diana Ross concert in Central Park and claimed that defendants were negligent in failing to provide adequate crowd control. Stated the

Appellate Division, First Department, in that case (143 AD 2d at 305),

> In the instant case the inquiry as to what risks were reasonably to be perceived must be framed in terms of what risks or dangers should reasonably have been anticipated by the City from the gathering of an extremely large crowd to hear a free concert by a renowned entertainer in Central Park on a summer evening. In light of common contemporary experience a jury could certainly find that, in the absence of adequate supervision and control of that crowd, it was reasonably foreseeable that disorder, unruliness, a melee or a riot could erupt from some cause ignited by the vagaries of myriad individuals 'jammed together' in a heightened atmosphere.
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> A jury here could reasonably find that the risk of a riot or a stampede could have been averted, or its consequences contained, by adequate crowd control measures which would have inhibited or prevented the eruption of precipitating incidents such as individual or group altercations, arguments or other provocative causes and that defendant City failed to exercise the reasonable care necessary under the circumstances to avoid the foreseeable risk.

Our case presents the same scenario. A stampede of concert-goers precipitated by an argument or altercation was clearly a foreseeable danger of a crowded outdoor reggae concert with 5,000 - 20,000 people. Whether the particular altercation between the two women that may have precipitated the rush of people who trampled plaintiff, as Clarke testified, could not have been anticipated and prevented since defendants testified that they were unaware of any prior criminal acts of violence at past concerts is not the inquiry. As the Court in Rotz observed, "The IAS court focused solely upon the foreseeability of the exact manner in which the disturbance was precipitated and concluded, as a matter of law, that it was an unforeseeable intervening event which relieved defendant of liability. The law, however, is to the contrary. That defendant could not anticipate the precise manner of the accident or the exact extent of injuries, however, does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable... Here, of course, the general risk reasonably to be anticipated from the dynamics of this large closely packed standing assemblage was the outbreak of disorder or commotion necessarily precipitated or initiated by the act or acts

of some third persons with resultant injury to some of those, such as plaintiff, who were in attendance at the concert" (143 AD 2d at 305-306) (internal quotation marks and citations omitted).

Indeed, movants' counsel's entire argument is structured around the contention that plaintiff's injuries were caused by an intervening criminal act which, as a matter of law, was unforeseeable and unpreventable since defendants were not aware of any past criminal acts at prior concert. However, as heretofore stated, this case does not involve the issue of the foreseeability of an intervening criminal act, but the foreseeability of injury caused by an out-of-control crowd, precipitated by either an altercation or some other event. All of the cases cited by movants' counsel in support of the motion involve only random criminal acts of violence and not crowd control and are, therefore, entirely inapposite to the facts of this case. Indeed, in Maheshwari v City of New York, 2 NY 3d at 295, supra), one of the cases cited by movants' counsel, the Court of Appeals stressed that the facts of that case, where four hoodlums, randomly and without provocation, attacked the plaintiff in the parking lot at a music festival in a City park, are distinguishable from those in Rotz (and consequently those in our case), stating, with respect to Rotz, that "it is, in any event, distinguishable from the one before us. The Appellate Division correctly recognized that Rotz involved crowd control, which is not the issue here."

Movants have failed to establish a prima facie entitlement to summary judgment as a matter of law by proffering evidence eliminating all issues of fact as to whether they provided proper and adequate crowd control measures.

Although there was testimony that there were approximately 100-150 security personnel in the park and 104-105 police officers outside the park, there was no testimony or other evidence showing that such was adequate for the number of people at that particular reggae concert. Moreover, Clarke's testimony that he was told by the police how much security was needed and that he matched or exceeded that number is inadmissible hearsay. No evidence was presented as to how many security personnel the NYPD deemed necessary for the concert. Therefore, Clarke's summary statement that he provided "even more" than he was told was required is meaningless. Moreover, no affidavit of an expert is annexed to the moving papers setting forth what security and crowd control measures would have been appropriate and sufficient and whether movants provided that appropriate and adequate level of security and crowd control. Likewise, movants' counsel's reference to that portion of plaintiff's testimony in which she testified concerning the security measures she observed were in place, including the searching of concert-goers, lacks any probative value since no evidence was presented that such security measures were adequate. Moreover, since there was no evidence presented that plaintiff was

attacked by someone wielding a weapon, or even that the altercation observed by Clarke which allegedly led to the stampede involved weapons, the thoroughness of weapons searches by security at the park entrances is irrelevant.

Therefore, whether movants "failed to provide adequate crowd control measures to avert that general risk reasonably to be anticipated here, and, if so, whether the intervening conduct of third persons in initiating the stampede whereby plaintiff was injured was a normal or foreseeable consequence of [movants'] failure to adequately supervise the crowd are fact questions which should be resolved at a trial and not as a matter of law on this motion for summary judgment" (Rotz, supra, at 306).

Since movants' have failed to establish a prima facie entitlement to summary judgment, the Court need not consider the sufficiency of plaintiff's evidence annexed to her opposition papers (see New York & Presbyt. Hosp. v. Allstate Ins. Co., 29 AD 3d 547 [2nd Dept 2006]).

Accordingly, the motion is denied.

Dated: February 28, 2013

KEVIN J. KERRIGAN, J.S.C.