

Gholson v 1815 Broadhollow Holding, LLC

2013 NY Slip Op 32425(U)

September 27, 2013

Supreme Court, Suffolk County

Docket Number: 10-26646

Judge: Jr., John J.J. Jones

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SHORT FORM ORDER

INDEX No. 10-26646
CAL. No. 13-000600T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 3-27-13 (#005)
MOTION DATE 5-15-13 (#006)
ADJ. DATE 7-10-13
Mot. Seq. # 005 - MD
006 - XMG

-----X
KEVIN GHOLSON, :
 :
 :
 Plaintiff, :
 :
 -against- :
 :
 1815 BROADHOLLOW HOLDING, LLC, :
 and ANTHONY STONE INVESTIGATIVE :
 SECURITY SERVICE, LLC, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment, Notice of Motion/ Order to Show Cause and supporting papers 1-18; Notice of Cross Motion and supporting papers 19-23; Answering Affidavits and supporting papers 24-26, 27-29; Replying Affidavits and supporting papers 30-33; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the branch of the motion by defendant 1815 Broadhollow Holding, LLC ("Broadhollow") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims, and directing defendant Stone Investigative to assume the defense of the action, to indemnify and hold Broadhollow harmless and to provide attorney's fees is denied; and it is further

ORDERED that the branch of the motion by defendant Anthony Stone Investigative Security Services, LLC (“Stone Investigative”), for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims, is granted, and the action is severed and judgment shall be entered dismissing the complaint and all cross claims asserted against it.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Kevin Gholson (“Gholson”), on June 19, 2009, at the Oragin nightclub which was located at 1815 Broadhollow Road Farmingdale. Plaintiff was a patron of the club on that date, when a fight broke out and he was slashed across the face with a broken bottle, by an unidentified individual, as he attempted to exit the nightclub.

Defendant Broadhollow now moves for summary judgment dismissing the complaint and all cross-claims against it, as well as an order directing defendant Stone Investigative to assume the defense of the action, to indemnify and hold Broadhollow harmless and provide attorney’s fees. In support of the motion defendant Broadhollow submits, *inter alia*, its attorney’s affirmation, the pleadings, the transcript of the deposition of the plaintiff, the transcript of the deposition of William M. Mason, as a witness for defendant Broadhollow, the transcript of the deposition of Robert Anthony Stone, as a witness for defendant Stone Investigative, and the transcript of the deposition of Belladanetta Mickens, as a non-party witness. Defendant Stone Investigative now cross-moves for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion defendant Stone submits, *inter alia*, its attorney’s affirmation, a copy of a contract between the defendants and it incorporates by reference exhibits from the motion of defendant Broadhollow. In opposition, plaintiffs submit, *inter alia*, their attorney’s affirmation, the affidavit of plaintiff Kevin Gholson, sworn to April 9, 2013, and photographs of the plaintiff.

Plaintiff Gholson testified that he arrived at the Oragin nightclub on the evening of June 18, 2009, and was there into the early morning of June 19, 2009. He waited in line for 15 to 20 minutes. Two well-known artists, Cam’ron and Hell Rell were scheduled to perform. He was frisked by security personnel at the entrance and his identification was scanned before he could enter the club. He did not see any security guards or bouncers in the club itself. He was in the club about two hours when the incident occurred. Prior to the assault, he did not have any problems and was not threatened by anyone. He did not know how many people were in the club that night. The atmosphere in the club was calm until a promoter or one of the DJ announcers went on stage and asked “who was the toughest neighborhood?” This is when the fighting started. Plaintiff attempted to get to the exit but had only gone a few feet when someone slashed the side of his face. He did not know who struck him. The scheduled artists never performed and no one announced that they were not going to perform. After the assault, he went outside of the club and waited for some time until an ambulance took him to the hospital.

William M. Mason appeared as a witness for the defendant Broadhollow. He testified that he is one of the owners of Broadhollow which operated the Oragin nightclub at the time of the incident. He further stated that Anthony Stone had a security contract in June 2009, for the nightclub and was responsible for security there on the night of the incident. The capacity of the nightclub was at least 1,080 people. Stone Investigative was in charge of the door and would use a machine to verify peoples’

ID's. Entrants were subjected to pat-downs and a wand was used like a metal detector where needed. They also counted how many people came in. He did not see the fight but believed it was caused by the performer refusing to perform. He also testified that there were other incidents when someone was injured as a result of a fight at the club. He further testified that there are always fights at nightclubs. When asked if police had been called previously to that location, he stated "[q]uite a few, I'm sure. It's a nightclub. When asked if there were patrons wearing "gang colors," he stated that "[we] were really strict about not having that happen because that's just a bad formula. If you had red or blue . . . or any of those colors, you weren't coming in."

Anthony Stone testified as a witness for the defendant Stone Investigative. He testified that he is the sole owner of defendant Stone Investigative and was so in 2009. His company provides protective services for a variety of clients. In May of 2009, his company entered into a contract with defendant Broadhollow to provide protective services to their night club operation. He was familiar with the incident that occurred at the Oragin night club on June 19, 2009. In early June he went to Oragin to assess their security needs and make a recommendation. He was unsure if said recommendation was made in writing. They provided security twice a week, on Thursday and Saturday. To the best of his recollection, they did follow the original recommendation. Recommendations for individual nights, however, would vary, depending on who was performing. These were made verbally. On June 19, 2009, he canceled prior engagements in order to take over as detail leader for security at the club because he was concerned. This concern arose because he was familiar with the artist Cam'ron, a rap musician, who was scheduled to perform. Cam'ron traveled with a large entourage and Mr. Stone was familiar with a prior shooting incident involving the entourage. His concern was that Cam'ron was a member of the Bloods gang. He was aware of this from connections he had with the New York City Police Department. As a result of his concern, he recommended 50 security specialists be employed that night. Defendant Broadhollow did not want to hire that many. The security personnel were paid \$175 per night. He testified that Broadhollow only wanted to hire 25. They compromised on 30, but Stone was only comfortable with that number if he was the detail leader. He was not aware if anyone from Broadhollow knew of Cam'ron's Bloods gang connection. He spoke to Broadhollow's in-house security about the crowd that was anticipated that night. No one would enter the club without being searched; search techniques included the metal detecting wand and a pat-down.

Seven of Stone's personnel conducted the searches at the two entrances to the club. He estimated that there were 1,400 people in the club. That night Cam'ron showed up without any entourage, just a "hype person." The incident occurred at 3:15 a.m. He heard a loud crash, a bottle, and he heard some of the Bloods say "we've been dissed." Asked how he made the assumption that there were Bloods in the club, Stone testified he knew some of them personally, they were wearing red, and that during a segment at the club they had identified themselves as Wyandanch Bloods and from other different areas of Long Island. They also were giving the high sign and saying Bloods all the way. He observed "a sea of red" and estimated that at least 80% of the crowd were Bloods. Cam'ron never performed that evening. He was not aware of any problems with Cam'ron and members of Broadhollow. When the fight started, bottles were being broken and he observed several people attacking each other. He and some of his men went into the crowd to disarm people and pass them on to be removed from the club. It took about 30 minutes to clear out the club. He further testified that under the contract they were supposed to have exclusive rights on how to provide protective services, one of which was to be kept up-to-date on events,

as they happen, so that they could assess the situation and apply the appropriate remedy to rectify it. Had he known that the show was not going to take place, he would have tried to get people out of the club sooner. He said that the fact that the crowd paid money and there was no show would be taken as disrespect. He testified that the Club had VIP areas where there was bottle service. There was a dress code, but beyond requiring a shirt, he could not recall the details.

Belladanetta Mickens testified as a non-party witness. She is acquainted with the plaintiff Kevin Gholson. She was in the Oragin nightclub the night the plaintiff was injured. She paid an admission fee to get into the club. She witnessed the fight and bottles and glasses being thrown. Prior to the fight, the crowd was getting revved up by the hype man who was calling out towns and asking who was in the building. Lots of things were being shouted. She only noticed three security guards inside that night. At some point the fight broke out. She saw a guy swing a bottle. She and her friends then found an exit and left the club. She noticed there were gang members in the club. She had been to the club at least six times previously and had never seen any type of altercation. She thought there should have been more security that night because of who was performing.

Pursuant to the agreement between the defendants, Stone Investigative was required to name Broadhollow as an additional insured on their liability insurance policy. It is undisputed that they did so. The contract also set forth that Stone Investigative was to provide armed and/or unarmed protection agents for Broadhollow's operations. It further provided that: "[t]he services to be provided are solely for the benefit of the client, and any services rendered do not confer rights on any other party." Under the contract, the duties and responsibilities of assigned agents was to "provide protective services for company operations, control access to restricted and unrestricted areas, crowd control, project a strong image, and to prevent, minimize and/or deter potentially hostile individuals and situations within the scope of the agent's legal authority under the laws of the State of New York..."

The proponent of a summary judgment motion 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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

A landowner must act as a reasonable man in maintaining his property in reasonably safe condition in view of all circumstances, including the likelihood of injury to others, the seriousness of

injury and the burden of avoiding risk, and the likelihood of plaintiff's presence is a primary independent factor in determining the foreseeability of injury (*Basso v Miller*, 40 NY2d, 233, 241, 386 NYS2d 564, 568 [1976]; *Kranenberg v TKRS Pub, Inc.*, 99 AD3d 767, 952 NYS2d 215 [2d Dept 2012]; *Afanador v Coney Bath LLC*, 91 AD3d 683, 936 NYS2d 312 [2d Dept 2012]). An owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control (*Browne v GMRI, Inc.*, 6 AD3d 640, 775 NYS2d 184 [2d Dept 2004]; *see, also, D'Amico v. Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]). To carry the burden of proving a prima facie case, plaintiff must generally show that defendant's negligence was a substantial cause of the events which produced the injury, although plaintiff need not demonstrate that the precise manner in which the accident happened, or extent of the injuries, was foreseeable (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, 434 NYS2d 166,169 [1980]). Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (*Derdiarian v Felix Contr. Corp., id.*). "Foreseeable" means that "in terms of past experience 'that there is a likelihood of conduct on the part of third persons ... which is likely to endanger the safety of the visitor' " (*Jacqueline S. v City of New York*, 81 NY2d 288, 294, 598 NYS2d 160 [1993], quoting *Nallan v Helmdley Spear, Inc.*, 50 NY2d 507, 519, 429 NYS2d 606 [1980]).

Defendant Broadhollow has failed to meet its burden of demonstrating its prima facie entitlement to summary judgment, with regard to liability, as a matter of law. The testimony establishes that fights were not uncommon at the nightclub. Broadhollow's witness alleged that they had a policy not to admit persons wearing gang colors, but there is no evidence that Broadhollow informed Stone Investigative, which was in charge of entrance to the club, of this policy, resulting in a large number of Bloods gang members being in the crowd the night plaintiff was injured. There is also an issue of fact with regard to Broadhollow's alleged failure to inform Stone Investigative that the scheduled artists were not going to perform. A further issue of fact exists regarding Broadhollow's refusal to accept Stone Investigative's initial recommendation for a larger number of security personnel and whether this refusal led to there being insufficient security. In view of the foregoing issues of fact, summary judgment dismissing the complaint must be denied.

That portion of Broadhollow's motion which seeks an order directing defendant Stone Investigative to assume the defense of the action, indemnify and hold Broadhollow harmless and provide attorney's fees is also denied. A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous (*Bradley v Earl B. Feiden*, 8 NY3d 265, 832 NYS2d 470 [2007]). The contract between Broadhollow and Stone Investigative does not contain an indemnification or hold harmless clause and does not require that Stone Investigative must provide a defense in this action. (*cf. Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 885 NYS2d 241 [2009]). The contract only requires that Stone Investigative name Broadhollow as an additional insured, which was done. Broadhollow, however, is not without a remedy in this matter. Since an additional insured has the same protection as a named insured, a direct action can be brought against the insurer of an additional insured (*Lue v Finkelstein & Partners, LLP*, 94 AD3d 1386, 943 NYS2d 636 [2d Dept 2012]; *see also Kassis v Ohio Cas. Ins. Co., supra*). Stone Investigative has also established, prima facie, that it was entitled to judgment as a matter of law dismissing the common-law indemnification

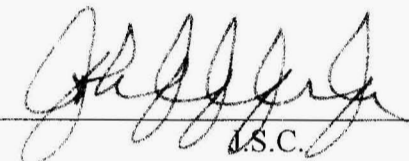
claim by demonstrating that the plaintiff's accident was not due solely to its negligent performance or nonperformance of an act solely within its province (*Schultz v Bridgeport & Port Jefferson Steamship Comp.*, 68 AD3d 970, 891 NYS2d 146 [2d Dept 2009]).

With regard to the cross motion by defendant Stone Investigative, the court finds that it can be considered, although untimely, because the motion for summary judgment herein is timely and was made on nearly identical grounds (that no duty was owed by defendants to plaintiff) (*see Giambona v Hines*, 104 AD3d 807, 961 NYS2d 519 [2d Dept 2013]; *Lennard v Khan*, 69 AD3d 812, 893 NYS2d 572 [2d Dept 2010]; *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]).

Defendant Stone Investigative has made a prima facie showing of its entitlement to summary judgment dismissing the plaintiff's claims, as well as the cross-claims made against it. Said defendant has demonstrated that it does not have a contractual or common law duty to protect the injured plaintiff from physical injury or attack. Furthermore, the Stone Investigative security or protective services contract was for limited services and expressly disavowed any obligation to third parties (*Walton v Mercy College*, 93 AD3d 460, 940 NYS2d 54 [2d Dept 2012]; *Dabbs v Aron Security, Inc.*, 12 AD3d 396, 784 NYS2d 601 [2d Dept 2004]).

Accordingly, defendant Stone Investigative is entitled to summary judgment herein.

Dated: 27 Sept. 2013



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION