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SHORT FORM ORDER

INDEX No. 08-16905
CAL No. 12-02287OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Acting Justice of the Supreme Court

MOTION DATE 5-6-13
ADJ. DATE 12-10-13
Mot. Seq. # 005 - MG
006 - MotD

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BETZY GARCIA and MARVIN GARCIA,

Plaintiffs,

- against -

R SQUARED HB LLC, JDC RESTAURANT LLC, d/b/a WHITE HOUSE NIGHT CLUB, MOREY ORGANIZATION, INC. d/b/a WBON 98.5, JARAD BROADCASTING COMPANY OF WESTHAMPTON, INC., d/b/a WBON 98.5, and RANDY ARVELO,

Defendants.

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Upon the following papers numbered 1 to 39 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; 12 - 29; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 30 - 32; Replying Affidavits and supporting papers 33 - 35; 36 - 39; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant R Squared HB LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against it is granted, and it is further

ORDERED that the motion by defendants Morey Organization, Inc. d/b/a WBON 98.5 and Jarad Broadcasting Company of Westhampton, Inc. d/b/a WBON 98.5 for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against them is granted to the extent of dismissing the complaint and the cross claims for contribution and common-law indemnification, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by Betzy Garcia ("the plaintiff") after she was struck with an umbrella by defendant Randy Arvelo on October 27, 2007 at approximately 3:00 a.m. while attending a promotional concert at the premises known as White House Night Club, located at 239 Montauk Highway, Hampton Bays, New York. According to the plaintiffs, they learned of the promotional concert after hearing an advertisement about it on the radio. Defendant R Squared HB LLC ("R Squared") is the owner of the premises. Defendant JDC Restaurant LLC d/b/a White House Night Club ("White House") leased the premises from R Squared. Defendant Morey Organization, Inc. s/h/a Morey Organization, Inc. d/b/a WBON 98.5 ("Morey") is a holding company which buys radio stations and individual broadcast licenses and defendant Jarad Broadcasting Company of Westhampton, Inc. d/b/a WBON 98.5 ("Jarad") is a subsidiary of Morey which does business as radio station WBON 98.5.

In the complaint and the bill of particulars, the plaintiff alleges that the defendants were negligent in, *inter alia*, the ownership, operation, maintenance and control of the night club and promotional event/concert, in failing to provide adequate security, and in violating General Obligations Law § 11-101, Alcoholic Beverage Control Law §§ 65 (2) and 106 (6).

In its answer, R Squared asserts cross claims against its co-defendants for common-law indemnification and contractual indemnification. In its answer, White House asserts a cross claim against its co-defendants for contribution, and in their answer, Morey and Jarad assert cross claims against their co-defendants for contribution and common-law indemnification.

R Squared and Morey and Jarad now move separately for summary judgment dismissing the complaint and all cross claims asserted against them.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d

338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

As a preliminary matter, the Court notes that the plaintiffs assert in their opposition papers that the deposition transcripts submitted by the defendants in support of their motions for summary judgment–including their own and the deposition transcripts of Mark O'Loughlin, director of property operations for Reckler Equity Partners, the property manager for R Squared, and Jed Morey, a previous employee of Morey Organization and individual shareholder of Jarad–are inadmissible since they were not signed. However, it is well settled that an unsigned deposition transcript which has been certified by the court reporter and submitted by the party deponent can be considered on a motion for summary judgment because it is deemed to have been adopted as accurate by that party (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). Thus, Mr. O'Loughlin and Mr. Morey's deposition transcripts are admissible. In addition, although the plaintiffs' transcripts were unsigned, since the plaintiffs have not raised any challenges to the accuracy of their deposition transcripts, they qualify as admissible evidence for the purposes of the motion for summary judgment made by the defendants (*see* ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]).

It is well settled that an out-of-possession lessor is not liable for injuries that occur on the premises, including injuries caused by a criminal act of a third person, unless the lessor retained control over the premises or was contractually obligated to maintain or repair any alleged hazard, or in the case of criminal acts, to provide security (*see* ***DeJesus v New York City Health & Hosps. Corp.***, 309 AD2d 729, 765 NYS2d 377 [2d Dept 2003]; ***Ogilvie v McDonalds Corp.***, 300 AD2d 376, 751 NYS2d 414 [2d Dept 2002]; ***Reidy v Burger King Corp.***, 250 AD2d 747, 673 NYS2d 441 [2d Dept 1998]). Here, R Squared established its *prima facie* entitlement to judgment as a matter of law dismissing the negligence claims asserted against it by demonstrating, through the deposition testimony of Mark O'Loughlin and a copy of the lease agreement entered into between R Squared and White House, that R Squared was an out-of-possession landlord that did not retain control over the premises, was not contractually obligated to make repairs or provide security and, as a result, was not liable for the plaintiff's injuries (*see* ***DeJesus v New York City Health & Hosps. Corp.***, *supra*; ***Ogilvie v McDonalds Corp.***, *supra*). Mr. O'Loughlin testified at his deposition that R Squared leased the premises to White House and was always an out-of-possession landlord. R Squared did not supervise or have any role in the management or operation of the nightclub. In addition, the lease specifically stated that during the lease, White House was to make all necessary nonstructural repairs to the premises, and the lease did not require R Squared to provide security for the premises.

Furthermore, the record establishes that Morey and Jarad did not own the subject premises, did not provide security for the premises, and were not providing any promotional services at the premises on the night of the incident. Thus, Morey and Jarad established their *prima facie* entitlement to judgment as a matter of law dismissing the negligence claims asserted against them as they owed no duty of care to the plaintiff (*see* ***Alami v 215 E. 68th St., L.P.***, 88 AD3d 924, 931 NYS2d 647 [2d Dept 2011]). Specifically, Mr. Morey testified at his deposition that Morey is a holding company which

purchases radio stations, individual broadcast licenses, and that Jarad is a wholly owned subsidiary of Morey. Radio station 105.3, which was held by Jarad and owned by individual shareholders, had an advertising contract with White House. Radio station 98.5 was a wholly owned subsidiary of Morey through Jarad, and there was no advertising contract between White House and 98.5. Mr. Morey testified that he performed financial reporting services for both radio stations for Morey and Jarad, and that none of the records indicated that either radio station provided any type of promotional services or appearances or that any disc jockey was compensated for a live appearance on behalf of either radio station at White House in October 2007. In addition, Mr. Morey testified that neither Morey or Jarad provided security at White House.

In opposition, the plaintiff failed to raise a triable issue of fact as to whether R Squared, Morey or Jarad could be held liable for negligence (*see* ***Alvarez v Prospect Hosp.***, *supra*). The plaintiff asserts that there is an issue of fact as to whether R Squared acted as a reasonable person in maintaining its property in a reasonably safe condition. However, as noted above, R Squared was an out-of-possession landlord that did not retain control over the premises, was not contractually obligated to make repairs or provide security and, as a result, could not liable for the plaintiff's injuries. Plaintiff has failed to raise an issue of fact as to R Squared's status as an out of possession landlord. Plaintiff further asserts that an issue of fact exists as to whether Morey or Jarad are liable since plaintiff Marvin Garcia testified that he thought that defendant Randy Arvelo was an employee of the radio station present that evening at White House since he saw him handing out t-shirts to the crowd with the name of a radio station on them. However, he could not remember what the name of the radio station was and he did not remember seeing any signs posted with a radio station's name on them.

Turning to the plaintiffs' remaining claims that the defendants' violated Alcoholic Beverage Control Law §§ 65 (2) and 106 (6), and General Obligations Law § 11-101, in order "[t]o establish a cause of action under New York's Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages" (***Dugan v Olson***, 74 AD3d 1131, 1132, 906 NYS2d 277, 278 [2d Dept 2010]; *accord* ***Sullivan v Mulinos of Westchester, Inc.***, 73 AD3d 1018, 901 NYS2d 663 [2d Dept 2010]; ***McArdle v 123 Jackpot, Inc.***, 51 AD3d 743, 746, 858 NYS2d 692 [2d Dept 2008]). Further, Alcoholic Beverage Control Law § 65 (2) provides that "[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to . . . [a]ny visibly intoxicated person." Alcoholic Beverage Control Law § 106 (6) provides in pertinent part that "[n]o person licensed to sell alcoholic beverages shall suffer or permit . . . such premises to become disorderly."

The plaintiffs concede in their opposition papers that their cause of action for violation of General Obligations Law § 11-101 is inapplicable to Morey. After reading the deposition testimony of Mr. Morey and Mr. O'Loughlin, the Court finds that Morey, Jarad, and R Squared established their *prima facie* entitlement to judgment dismissing this claim as well as the remaining claims for violations of the Alcoholic Beverage Control Law. Mr. O'Loughlin testified that R Squared was an out-of-possession landlord and that it did not operate the nightclub. Mr. Morey testified that none of Morey or Jarad's records indicated that either radio station 98.5 or 105.3 had provided any type of promotional services, appearances, or that any disc jockey was compensated for a live appearance on their behalf at

White House in October 2007. Thus, there is no evidence that Morey, Jarad, or R Squared served Mr. Arvelo alcohol on the evening of the incident or was licensed to sell alcohol at the premises.

In opposition, the plaintiffs failed to raise a triable issue of fact as to whether Morey, Jarad, or R Squared could be held liable for violating the aforementioned statutes as they have not addressed them in their opposition papers (*see* ***Alvarez v Prospect Hosp.***, *supra*). Accordingly, the motions for summary judgment by R Squared, Morey, and Jared are granted. Since this finding defeats any cross claims for common-law indemnification and contribution against R Squared, Morey, and Jarad, they are dismissed (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]). As to the cross claim by R Squared against Morey and Jarad for contractual indemnification, the Court finds that Morey and Jarad are not entitled to dismissal of that cross claim since they failed to address it in their moving papers.

In light of the foregoing, the motion by R Squared is granted and the motion by Morey and Jarad is granted to the extent of granting them summary judgment dismissing the complaint and the cross claims for contribution and common-law indemnification.

Dated: MARCH 28, 2014

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**