Azam v MacDougal Assoc., LLC
2014 NY Slip Op 33659(U)
September 2, 2014
Supreme Court, New York County
Docket Number: 113004/2011
Judge: Anil C. Singh
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FA 9/5/14 F

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

Index Number : 113004/2011
AZAM, WAQAS
vs.
MACDOUGAL ASSOCIATES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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COUNTY CLERK'S OFFICE
NEW YORK

SEP 02 2014

Dated: 9/2/14

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

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

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

----------X

WAQAS AZAM,

Plaintiff,

-against-

MACDOUGAL ASSOCIATES, LLC, LUXOR LOUNGE, INC., and JOHN DOE – unknown assailant,

Defendants.

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DECISION AND ORDER

Index No. 113004/2011

HON. ANIL C. SINGH, J.:

Defendant MacDougal Associates, LLC, ("MacDougal") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross-claims against it, contending that, as an out-of-possession landlord of the demised premises where the alleged assault and battery occurred, it owed no duty to plaintiff. Plaintiff opposes the motion. The co-defendants have not submitted opposition papers.

Luxor Lounge is a restaurant/bar located at 118 Macdougal Street in Manhattan. Plaintiff Waqas Azam, who was a patron of the establishment on June 18, 2011, alleges that the individual who owns the restaurant/bar, a bouncer, or one of the restaurant/bar's employees intentionally punched him in the face, causing injuries.

Subsequently, plaintiff commenced the instant personal action. There are three named defendants: 1) MacDougal, the owner/landlord of the building where the restaurant/bar is a tenant; 2) Luxor Lounge, Inc.; and 3) "John Doe, unknown assailant," who is identified as the individual who owns the restaurant/bar, a security guard, agent, servant, employee or bouncer. The complaint asserts causes of action for assault and battery; negligence; negligent hiring and retention; and punitive damages.

Defendant MacDougal filed a verified answer, asserting a cross-claim for indemnification and five affirmative defenses. Defendant Luxor Lounge, Inc., filed a verified answer, asserting thirteen affirmative defenses and two cross-claims against MacDougal. The first cross-claim is for indemnification and/or contribution based on comparative fault. The second cross-claim alleges that plaintiff's alleged injuries were caused in whole or in part by MacDougal's negligence.

Discussion

The standards for summary judgment are well settled. "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" (Winegrad v. New York University Medical

Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (See Id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion could should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dept., 1989]). The court's role is "issue-finding, rather than issue-determination" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

The moving defendant contends that it is entitled to summary judgment based upon: 1) statements made by plaintiff in an EBT; 2) a copy of the lease agreement for the premises; and 3) the sworn affidavit of the property manager of the building.

Defendant exhibits a lease agreement dated August 2006 between MacDougal Associates, LLC, as owner/landlord, and Said Aboras, as tenant. The lease states that the tenant shall occupy the demised premises for use as a Moroccan-style restaurant and "the sale of foods and beverages in connection therewith only" (Motion, exhibit E). The lease, which is for a term of fifteen years, requires the restaurant to name MacDougal as an additional insured on a general liability policy and also requires the tenant to indemnify and hold the landlord harmless for any liabilities/damages.

Next, the moving defendant exhibits the EBT of plaintiff Waqas Azam (Motion, exhibit D). Plaintiff stated that the man who hit him was the bar owner (id., at p. 26). According to plaintiff, the bar owner was "not too tall, Arabic with short hair, kind of chubby, wearing dress pants and a goatee" (id., at 26-27).

Finally, the moving defendant exhibits the sworn affidavit of Jose Diaz, who states that he is employed by the landlord as the property manager of the building (Motion, exhibit F). Mr. Diaz states that co-defendant Luxor Lounge has separate ownership and management from the landlord, and that the landlord is in no way affiliated with the ownership and/or management of the restaurant. Further, he contends that the landlord had nothing to do with hiring or supervising security, bouncers, bartenders, servers, or any other employees and/or independent

contractors affiliated with the restaurant. Further, the landlord did not play any part in installation of any improvements or furnishings. Finally, he asserts that a man named "Said Boras" is the owner of Luxor Lounge; he has no knowledge of any violent tendencies on the part of Mr. Boras or any of his employees or agents; and that, prior to the incident in issue, the landlord had never received any complaints or notices regarding any assaultive, violent or dangerous behavior on the part of Luxor Lounge staff or management.

Generally, an out-of-possession landlord cannot be held liable for injuries that occur on its premises, unless the landlord has retained control over the premises, or over the operation of the business conducted on the property (Devlin v. Blaggards III Restaurant Corp., 80 A.D.3d 497 [1st Dept., 2011]). "An owner of premises generally owes no duty to control the conduct of its tenants for the benefit of third persons" (85 N.Y.Jur.2d Premises Liability, section 161). An out-of-possession landlord with limited right of re-entry cannot be held liable for an assault that occured on the demised premises (Regina v. Boradway-Bronx Motel Co., 23 A.D.3d 255, 256 [1st Dept., 2005]).

Here, the Court finds that plaintiff has made out a prima facie case that it is an out-of-possession landlord that cannot be held liable under the circumstances.

Plaintiff has not come forward with any evidence to rebut the moving

defendant's prima facie case. Instead, plaintiff argues that the motion should be denied because discovery is not complete. Plaintiff contends that it has not had an opportunity to properly examine the property manager. According to plaintiff, it has not had an opportunity to inquire into any procedures and protocols that were used to screen and background check prospective tenants and whether the landlord was aware or had notice of any prior history of violence on the part of the tenant.

"[T]he fact that the nonmovant has not completed discovery does not make the motion premature, where the nonmovant fails to tender an affidavit or affidavits averring the existence, in admissible form, of proof which would present triable issues of fact" (97 N.Y.Jur.2d Summary Judgment, section 38). "Plaintiff's mere hope that discovery will uncover evidence needed to defeat summary judgment is insufficient to deny the motion" (Smartix International Corp. v. Mastercard International LLC, 90 A.D.3d 469, 470 [1st Dept., 2011]).

Accordingly, it is

ORDERED that the motion for summary judgment is granted.

The foregoing constitutes the decision and order of the court.

Date: SEP 0 2 2014
New York, New York

Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE