Britt v SCE Group Inc.
2014 NY Slip Op 34035(U)
May 28, 2014
Supreme Court, Bronx County
Docket Number: 309856/2011
Judge: Kenneth L. Thompson, Jr.
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[* 1] FILED Jul 07 2014 Bronx County Clerk

FILED Jun 04 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

JAMES BRITT,

Plaintiff,

-against-

SCE GROUP INC. d/b/a SIN CITY CABARET, "JOHN DOE" and "JAMES DOE," fictitious names designated persons who caused and/or permitted injury to Plaintiff,

Defendants.

Index No. ~~303911/08~~ 309866-2011

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

SCE GROUP INC. d/b/a SIN CITY CABARET

Third-Party Plaintiff,

-against-

EMISSARY SECURITYGROUP, INC.,

Third-Party Defendant.

Third-Party Index No.: 83869/12

The following papers numbered 1 to 7 read on this motion, for summary judgment

No On Calendar of 03/04/14	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1,5
Answering Affidavit and Exhibits	3,4,7
Replying Affidavit and Exhibits	
Affidavit	
Memorandum Of Law	2,6
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, SCE Group Inc. d/b/a Sin City Cabaret, (Sin City), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint as against it. Third-party defendant, Emissary Security Group, Inc., (Emissary), moves pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint as against it. Both motions are hereby consolidated for decision and disposition.

Plaintiff was a security guard employed by Emissary, to provide security to a club owned by Sin City. Plaintiff was injured when he attempted to quell an altercation. He suffered a cut on his head and neck. There is an issue of fact as to whether plaintiff was cut with a box cutter that was impermissibly brought into the club or a champagne bucket that was already in the club.

Sin City's security protocol required everyone except ownership and management to walk through a metal detector and be subject to a pat down. Plaintiff testified from his personal experience that some patrons were allowed to enter Sin City without passing through the metal detector. Plaintiff also avers that on the night of his injury, some of the people involved in the altercation had been exempted from the entrance search by Sin City's owner. "[T]he evidence proffered by the plaintiffs indicates that [the club's] purported custom and practice of searching patrons was not uniformly exercised, and as noncompliance with one's own established rule is some evidence of negligence (see *Haber v Cross County Hosp.*, 37 NY2d 888, 889 [1975]; *Danbois v New York Cent. R.R. Co.*, 12 NY2d 234 [1963]), a triable issue of fact was raised regarding the reasonableness of [the Club's] security measures." (*Bryan v Crobar* 65 A.D.3d 997, 999-1000 [2nd 2009]).

On a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *(Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]). "It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination." *(Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]).

With respect to Emissary's motion to dismiss the third-party complaint as against it, there is an indemnity provision in the contract between Emissary and Sin City. It is clear from the indemnification provision itself, that Emissary's obligation to indemnify Sin City does not arise in the absence of negligence on the part of Emissary. As there is an issue of fact as to whether emissary security guards allowed patrons to enter the club on the night of the plaintiff's injuries, there is an issue of fact as to whether Emissary was negligent.

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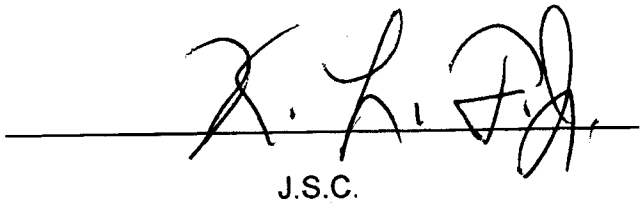
Accordingly, Sin City's motion for summary judgment is denied and Emissary's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: MAY 28 2014



J.S.C.
KENNETH L. THOMPSON, JR.