SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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YOSEF ALLEN, **Index No.: 158794/2013**

Plaintiff,

-against-

MANHATTAN CENTER STUDIOS, INC. and MANHATTAN CENTER PRODUCTIONS, INC., individually and d/b/a MANHATTAN CENTER, HAMMERSTEIN BALLROOM, THE HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, INTERNATIONAL PROTECTIVE SERVICE AGENCY, a division of INTERNATIONAL PROTECTIVE GROUP, LLC, STRIKE FORCE PROTECTIVE SERVICES COMPANY, INC., THE BOWERY PRESENTS, LLC and "JOHN DOE," **DECISION/ORDER**

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Motion sequence numbers 004, 005, 006, 007 and 008 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Yosef Allen on October 21, 2012, when, while attending a concert on the main floor of the Manhattan Center, Hammerstein Ballroom, in Manhattan, New York (the "Venue"), an unidentified man fell over a third-floor balcony rail and landed on him.

In motion sequence number 004, defendants Manhattan Center Studios, Inc. ("MCS"), The Holy Spirit Association for the Unification of World Christianity ("HSA") (together, the "MCS defendants") and Manhattan Center Hammerstein Ballroom ("MCHB") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them,

or, alternatively, for summary judgment in their favor on their cross-claims for common-law and contractual indemnification and breach of contract for failure to procure insurance against defendant The Bowery Presents, LLC ("Bowery"). It should be noted that the causes of action against defendant MCHB were discontinued via an October 23, 2014 order of this Court, so this motion will be addressed in regard to the MCS defendants only.

In motion sequence number 005, Bowery moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it, as well as for summary judgment in its favor on its cross-claim for contractual indemnification against MCS.

In motion sequence number 006, defendant International Protective Group, LLC ("International") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it.

Plaintiff cross-moves, pursuant to CPLR 3123, for an order striking the MCS defendants' answer for their alleged spoliation of evidence, or, alternatively, for an order precluding them from offering at trial testimony and evidence on the issue of adequacy of security at the event or directing that an adverse inference be made as to this issue.

It should be noted that, during oral argument on June 26, 2017, this Court granted the motions of defendant Strike Force Protective Services Company, Inc. (motion sequence numbers 007 and 008), which sought to dismiss the complaint and all cross-claims against it.

BACKGROUND

On the day of the accident, HSA was the owner of the Venue where the accident occurred. MCS, the operator of the Venue, leased the Venue from HSA. Pursuant to a contract and a rider with MCS, Bowery promoted and organized the nearly sold-out concert that was

underway at the Venue at the time of the accident. For the concert, MCS hired International to provide security guard services for the lobby and the front of the house. Bowery hired Strike Force to provide security guards for the stage and backstage areas. Plaintiff, who was standing on the main floor of the Venue at the time of the accident, was injured when an unidentified male concertgoer (the "Patron") fell from a third floor balcony box and landed on top of him. The balcony boxes were reserved for 20 ticket holders, and access to the boxes was controlled by International security guards. It is unclear from the record as to whether the Patron possessed a proper ticket for the subject balcony box.

Plaintiff's Deposition Testimony

Plaintiff testified that, at the time of the accident, he was attending a crowded concert at the Venue. During the concert, plaintiff looked around the Venue and observed concert attendees standing up, waiving their arms and standing at the upper balcony box railings. Plaintiff explained that, while he was standing on the main floor of the Venue and watching the concert, the Patron fell on him from one of the Venue's upper levels. Plaintiff did not observe the Patron prior to the impact. Plaintiff also testified that he was not familiar with Bowery or its role in promoting the concert.

Deposition Testimony of Samantha Sichel (Concert Attendee)

Samantha Sichel testified that she was a concertgoer at the Venue at the time of the accident. She and her boyfriend were sitting in either the last row or the second to last row of the third-floor balcony. When asked whether the section that she was sitting in was completely filled, she responded, "Not completely. It was almost full" (Sichel tr at 18). She remembered someone flashing a flashlight in the balcony where she was seated, and she believed the person to

be "security" (*id.* at 20). Sichel explained that "[t]ypically they flash the light when somebody is doing something they shouldn't be doing" (*id.* at 21). Sichel could not remember at what point during the concert that she observed the flashing lights, but she believed that they flashed the light at the Patron at some point before he fell. However, when asked specifically whether she knew "that the light was being purposely directed into that balcony area where [the Patron] was," she replied, "I can't speak to that" (*id.* at 27). Later during her deposition, when asked if she knew why the guard was waving the flashlight, she said, "Do I know? I can't know why he was waving it" (*id.* at 61).

Sichel testified that the Patron "was waving his arm above his head and then the next thing I knew he was - - I think I even remember him holding onto the banister for a brief and then his fingers slipped" (*id.*). She further testified that he "kind of swung himself over from his passionate dancing, held onto the banister . . . and then his fingering just quickly kind of slipped and he fell" (*id.* at 28-29). Sichel noted that "it happened so fast, yes. We said wow, he just fell" (*id.* at 29). When asked if she ever saw the Patron seated in the balcony prior to the accident, she replied, "I don't remember" (*id.* at 58). When asked how long she saw him before he fell, Sichel responded, "The whole thing was pretty quick . . . . Maybe the whole thing was within a minute" (*id.* at 58-59). Sichel described the Patron as "acting crazy" at the time of the accident, based upon the fact that he was waving his arms and dancing "so close to the rail" while "in an elevated position" (*id.* at 23, 71).

When further asked what drew her attention to the Patron, she replied, "I don't know. I guess you could tell that he was a little more excited than everyone else . . . it seemed a little out of the ordinary" (*id.* at 24). When asked to describe what other behavior she observed from the

Patron before he fell, Sichel explained, "I think it was just the arm and the pace at which he was waving his [one arm with an open hand]" (*id.* at 25). Sichel also remembered the Patron as being "close to the rail and elevated . . . [j]ust for a brief moment right before [the accident]" (*id.* at 26). At the moment that he fell, the Patron was not standing with his feet on the floor, as he was elevated on a chair or on a ledge. At the time of the accident, "[a] normal amount of people" were in the balcony area (*id.*).

After the accident, Sichel and her boyfriend left the concert because she was "so shaken up and [she] wanted to make sure that . . . [the Patron] was okay" (*id.* at 35). When she and her boyfriend reached the street, they "saw the guy and chased after him" (*id.* at 38). When they caught up with him, Sichel noticed that "he seemed like he was very out - - he was not sober" (*id.* at 39).

Deposition Testimony of Anthony Cimmino (MCS's Director of Events)

Anthony Cimmino testified that he served as MCS's director of events on the day of the accident. He explained that MCS was in charge of operating the Venue, as well as of overseeing the production of events. Cimmino testified that HSA owned the Venue, and that MCS leased the space form HSA. As far as he knew, HSA had no presence at the Venue and performed no inspections or maintenance duties. He asserted that MCS's "[o]perations department" was "responsible for everything pertaining to the facility, heating; air conditioning; repairs; maintenance; electrical; plumbing; anything in that nature" (*id.* at 15). In addition, HSA did not install the balcony railings at the Venue.

Cimmino testified that Bowery, a promoter, "would sign a contract with [MCS] to bring a band to [the Venue]" (*id.* at 25). Notably, once the contract between MCS and Bowery was

signed, MCS "suppl[ied] all the security necessary for the function to operate" (*id.*). MCA hired International to provide safety services at the Venue. International's guards were responsible for checking the patrons' tickets, so as to make sure the Venue did not become overcrowded. These guards were also responsible for preventing unruly behavior and making sure that intoxicated persons were not sold alcohol. He also noted that "City code dictates that every exit door has to have a fire guard and every location has to have a specific security guard . . . . So [International] . . . put those people in place as required per show" (*id.* at 22).

Cimmino explained that Bowery brought in its own company to provide security for the protection of the stage and backstage locations (*id.*). That said, Bowery was not responsible for cleaning the Venue, making sure that it was in a safe condition or ensuring that the Venue's balcony railings were in compliance with any and all relevant building codes. In addition, preventing overcrowding was not one of Bowery's responsibilities, nor was it responsible for checking tickets to make sure that the appropriate number of people were in each balcony box. Cimmino maintained that he was unaware of anything that Bowery might have done to cause or contribute to the accident.

At his deposition, Cimmino was shown the promotion agreement between MCS and Bowery ("the MCS/Bowery Agreement"), and he acknowledged that it consisted of "a generic contract" and a "rider . . . that was negotiated specifically for [the] October 21, 2012 Justice Concert" (*id.* at 239).

Cimmino testified that renovations take place at the Venue on an ongoing basis, and that, one year before the day of his deposition, MCS's "internal operations" raised the height of the upper balcony railings, but he did not know the reason (*id.* at 32). He asserted that, before they

were raised, the railings "complied with all of the applicable building codes" (*id.* at 33).

Cimmino further testified that he never observed any concertgoer fall from any of the balconies at the Venue, nor did he ever receive any complaints in regard to anyone hanging over the balcony in any unsafe manner. In addition, he was never advised that the balcony railings were too low. While concertgoers were not allowed to hang over the balcony railings, there were no rules prohibiting them from standing at the railings and extending their arms over them. He also noted that MCS operations employees were charged with monitoring surveillance cameras at the Venue.

Deposition Testimony of Linda Kensak (a Freelance Production Manager Working for Bowery)

Linda Kensak testified that she was a freelance production manager working for Bowery on the day of the accident. In 2012, she worked on 30 to 40 shows for Bowery. She explained that Bowery is a concert promoter that puts on live events for the public. As production manager, Kensak's duties included reaching out to various artists' representatives and determining the artists' production requirements. Kensak then arranged for the labor necessary to execute the load-ins. Specifically, Kensak's job was "to advance the show with the artist, execute their production, put them on [the stage] . . . load [the show] out and walk away" (Kensak tr at 12).

Kensak explained that Bowery set a production budget, which included catering costs, backstage security, production runners, production assistants, van rentals, stage, lights, sound video rental and EMT services. Kensak testified that MCS was in charge of providing for security guards for the front of the Venue, and that it hired International, a security company, to

provide these guards. While Bowery paid for at least some of the front-of-house security, it "was not responsible [for] making determinations as to how many security guards and fire guards were to be supplied at Bowery Presents events at [the Venue]," as this was MCS's responsibility. Further, Bowery did not have the ability to budget for said security, because "[the budget] is determined by the amount of ticket sales. If you are sold out you have your record of deployments" (*id.* at 47).

When asked if, when she contacted the bands, she had any discussions regarding safety issues, she replied, "No. I mean, yes, meaning just backstage stuff" (*id.*). This included determining how many guards were needed for the barricades protecting the stage and the dressing rooms backstage. Kensak testified that she hired a company called "Strike Force" to protect the backstage area (*id.* at 13). In addition, during the concerts, Kensak "constantly walk[ed] around" (*id.* at 79).

Kensak testified that the maximum capacity for the subject third-floor balcony box was 20 people, and that tickets, which were printed by Bowery, were checked at its entrance in order to ensure that it did not exceed capacity. That said, it was not Bowery's responsibility to make sure that the Venue did not exceed capacity. She acknowledged that there were times that someone "sweet-talked somebody into getting into the box without a ticket" (*id.* at 84). As anyone could access the box, it was necessary to have one of International's guards stationed there to check tickets, and, in fact, she was sure that an entrance guard was deployed there during the concert. Kensak also testified that she never specifically asked for any guards to be posted inside the balcony boxes, because the boxes were "small . . . . So you put the guard at the entrance of the box" (*id.* at 87).

Specifically, Kensak testified:

> "Typically the production manager would ask me, are you ready for doors with your deployments, and I would then go back to whatever building I'm in and I would say are you ready with your deployments, and if they are we say yes, and we open the doors"

(*id.* at 22). Notably, if she had any issues with the deployment of guards, she would speak to David Hartman, MCS's director of security, as he was the person in charge of deploying security guards at the front of the house.

Deposition Testimony of Jerry Heying (International's President and Owner)

Jerry Heying testified that he was International's president and owner on the day of the accident. He explained that International is a licensed guard agency. International had an agreement with MCS to provide security services at the Venue on the day of the accident. International's event guards were charged with crowd safety, which included "control[ling] access from one level [of the Venue] to another" (Heying tr at 22). International was also responsible for providing security in "the lobby areas, the sidewalk . . . the fire guard post within the front of the house areas . . . [and front of] [h]ouse [s]ecurity" (*id.*).

Heying explained that he "worked under" Hartman, MCS's director of security, and that International did "whatever [MCS told it] to do" (*id.* at 35). In addition, Hartman "guid[ed], direct[ed], [and] place[d]" International's security guards (*id.* at 36). To that effect, Hartman would "effectuate" moving International's security guards "from one spot to another spot" (*id.*).

Heying also testified that Bowery did not retain International for any services related to the concert underway at the time of the accident. However, Bowery did hire a security firm called "Strike Force," which provided security for the band and the crew (*id.* at 39). As such, it

"would provide security around the stage and access to the back of the house" (*id.*). He explained that the "back of the house" meant "the back of the areas not where the patrons are, the backstage area" (*id.* at 39). Strike Force also "provide[d] security in the pit, which is the separation between the audience and the stage" (*id.*). He also confirmed that Bowery did not have any role in planning or providing security for the concertgoers.

Deposition Testimony of David Hartman (MCS's Director of Security)

Hartman testified that he was MCS's director of security on the day of the accident. He explained that MCS hired International to provide security guards at the Venue. In addition, a company called Strike Force also provided security guards, but they were not responsible for patron safety in the front of the house.

Hartman testified that he was the person who determined how many guards were to be assigned to the events. He would make the determination "according to the budget" (*id.* at 64). He explained that it was Bowery's responsibility to let him know "how much of a budget that [he had]" (*id.* at 77). He noted that "there were no box guards assigned to [the concert]," because it was being produced "at a discounted rate" and Bowery did not order any (*id.* at 64).

Hartman testified that the security guards at the Venue were only charged with checking tickets, so as to prevent the balcony boxes from becoming overcrowded. If they did observe unsafe activity, they would notify their supervisor by shining a flashlight or using their radio. Hartman maintained that, during the time that he worked for MCS, he never observed any patrons fall from a balcony.

The Affidavit of Alistair Farrant (MCS's Vice-President of Operations)

In his affidavit, Alistair Farrant stated that he was MCS's vice-president of operations on

the day of the accident. He maintained that all security at the Venue was under the supervision and control of Hartman, MCS's director of security. Hartman was also in charge of the security provided by International. Hartman also directed the placement of International's personnel, and ordered any and all services needed by them to perform their duties.

Affidavit of Spencer Lamb (Bowery's Employee in Charge of Senior Operations and Finances)

In his affidavit, Spencer Lamb stated that, on the day of the accident, he was "employed in a senior operations and financial position for [Bowery]" (Bowery's notice of motion, exhibit M, Spencer aff). He explained that, in February of 2012, Bowery entered into the MCS/Bowery Agreement with MCS to promote concerts at the Venue on a non-exclusive basis. While the MCS/Bowery Agreement does not cover a specific event date, "Rider A" (the "Rider") was prepared to cover the concert that is the subject of this action (*id.*).

Spencer stated, "According to [the MCS/Bowery Agreement and the Rider] for the concert on October 21, 2012 . . . Bowery had a license to use [the Venue] for less than 24 hours, from 6:00 a.m. on October 21, 2012 through 2:00 a.m. on October 22, 2012" (*id.*). He noted that the MCS/Bowery Agreement included indemnification and insurance procurement provisions.

Spencer also stated that "Bowery did not own, lease, occupy, control, or operate [the Venue] on or before October 21, 2012," and that "Bowery was not responsible for front of house security operations at the [Venue] on October 21, 2012" (*id.*). In addition, "Bowery was not responsible to make sure that [the Venue] was in a safe condition . . . [and] Bowery did not have any responsibility to ensure the railings at [the Venue] were in compliance with any building codes on October 21, 2012" (*id.*).

Further, Bowery was not responsible for checking tickets, or preventing overcrowding or the sale of alcoholic beverages at the concert. It was also not Bowery's responsibility to make sure that the balcony boxes contained the appropriate amount of patrons or to protect patrons from falling over the balcony railings.

Lamb also maintained that Bowery purchased a commercial general liability insurance policy from Axis Insurance Company ("Axis"), effective September 4, 2012 to September 4, 2013 (the "Bowery Policy"), as well as a commercial excess liability policy from Axis, effective September 4, 2012 to September 4, 2013 (the "Bowery Excess Policy"). Copies of these insurance policies are attached to Lamb's affidavit as exhibits "2" and "3" (*id.*). It should be noted that the policies included provisions naming, as additional insureds, those persons or organizations whom Bowery was required to add as an additional insured pursuant to a written contract or agreement.

Expert Affidavit of Jeffrey Schwalje, P.E.

In his affidavit, Jeffrey Schwalje states that, on May 4, 2016, he traveled to the Venue and inspected and photographed the accident area, including the subject balcony from where the Patron fell. He described the Venue as "a large theatre constructed with a center stage; a large open orchestra; three levels of balcony seating provided on each side; and two large balcony sections in the rear" (MCS's notice of motion, exhibit H, Schwalje aff). The Venue was first built in 1906, and then completely renovated between 1997 and 1998.

Schwalje described the balcony area where the accident occurred as "contain[ing] 20 individual seats that are position[ed] in two rows facing the front of the balcony" (*id.*). The balcony floor is covered with vinyl flooring, which was installed on top of a concrete floor.

The present floorboards were 0.197 inches thick. In addition, a slightly curved wooden wall was constructed across the front of the balcony. It measured 5 inches in width by 14.5 inches in height.

Schwalje further explained that the balcony contains a 1.5 inch diameter steel pipe railing, which "is positioned 30.125 inches above the existing vinyl floor," or "30.32 inches above floor level" (*id.*). This rail was located approximately 26 feet above the orchestra floor where plaintiff was standing at the time of the accident. Schwalje noted that a second railing of the same type had been installed above the subject lower rail. Installed sometime after the date of the accident, this second railing was located 41.875 inches above the floor level and 11.75 inches above the lower rail. Schwalje observed that both rails were "securely installed" (*id.*).

Schwalje stated that the Venue is a "Place of Assembly," as defined by the New York City Building Code (*id.*). He maintained that, at the time of the balcony seating's construction, the height of the lower railing met the applicable 1968 New York City Building Code requirements, including amendments to June 1, 1993, in that it was over 30 inches above floor level at the time of the accident.

Expert Affidavit of Harry Meltzer

In his affidavit, Harry Meltzer, a licensed professional architect, stated that, after the accident, he inspected the third-floor balcony box and observed that the horizontal rail that existed on the day of the accident measured 30 inches above the balcony floor, the minimum required by the 1968 New York City Building Code. He noted that, although the Venue underwent major renovations between 1997 and 1998, the railing height remained unchanged until after plaintiff's accident. In addition, he observed that an additional metal railing was later

added. This railing measured 41 inches above the balcony floor. At the time of his inspection, the New York City Building Code for 2008 required a height of 42 inches for such railings.

Meltzer maintained that defendants' lack of compliance with the 2008 New York City Building Code was especially egregious considering that "[t]he center of gravity of the average person is almost always above the 30 inch railing height that existed on the date of the accident" (Meltzer aff). He explained that "[t]he fact that the balcony boxes had no fixed seating and that concertgoers are known to stand, dance and lean over the balcony railings, made it incumbent upon the owners and operators of the facility to raise the railings to industry standards" (*id.*). He acknowledged, however, that "[w]hile patron safety is increased by raising the railing height above thirty (30) inches, this can result in obstructed views of the stage thereby adversely affecting the patron's viewing experience" (*id.*).

The Lease Between MCS and HSA

Article 42 of the lease between MCS and HSA (the "Lease") provides that MCS, as tenant of the Venue, be responsible for all non-structural repairs to the Venue, including ceilings, partitions and walls.

The MCS/Bowery Agreement and the Rider

Page eight of the MCS/Bowery Agreement states that the agreement constituted "a license and not a lease," and that "[Bowery] shall have the non-exclusive right to use [the Venue] and to access [the Venue]" (the MCS defendants notice of motion, exhibit F, the MCS/Bowery Agreement).

Page five of the MCS/Bowery Agreement states, "[Bowery] hereby agrees to use [MCS's] Fire Guards for all security, expressly including security for the stage and backstage

areas" (*id.*). In addition, "MCS reserve[d] the sole right to determine the appropriate number of Security Guards for the Event," and "all liquor sold for the Event [would be] purchased and sold solely by [MCS]" (*id.*).

Page six of the MCS/Bowery Agreement states that "[Bowery] will not mark, staple . . . paint or drill into any part of [the Venue], or in any way deface or alter [the Venue]" (*id.*).

International's Post Orders

International's post orders for the Venue state that its security guards are responsible for enforcing "Quality of Life" regulations, which include making sure that the Venue stays clean and the noise levels remain low. In addition, the security guards were to approach smokers in a courteous manner and advise them of the Venue's no-smoking policy. In the event that the security guards become aware of drugs in use, they are to advise those using them to "take it outside or the police will be called" (plaintiff's opposition, exhibit L, International's Post Orders).

The Surveillance Video of the Accident

A 12-second video (the "Video") was submitted to the court, which showed the sequence of events immediately leading up to the accident. The Video depicts a crowded concert venue with multiple people standing at the balcony railings. Two seconds into the Video, the Patron is not yet visible. At three seconds into the Video, the Patron steps forward to the railing. At 12 seconds into the Video, the Patron is no longer in the screen shot, because he fell from the balcony. Therefore, less than 10 seconds elapsed between the time that the Patron approached the subject balcony railing and the time that he fell over it.

DISCUSSION

"'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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Negligence Claim against the MCS Defendants (motion sequence number 004)

The MCS defendants move to dismiss plaintiff's negligence claim against them. Initially, plaintiff offers no opposition to that part of the MCS defendants' motion which seeks to dismiss the complaint as against HSA, an out-of-possession landowner. In addition, no party has opposed HSA's request for dismissal of any and all cross-claims asserted against it.

Thus, HSA is entitled to dismissal of the complaint and all cross-claims against it. Therefore, in the remainder of this decision, the MCS defendants' motion will be addressed in regard to MCS only.

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept

2006]). In addition, a plaintiff must prove that the defendant either created, or had actual or constructive notice of the defective condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In this case, MCS argues that it is entitled to dismissal of the complaint against it, because it did not create or have actual or constructive notice of any defective condition that caused the accident. In support, MCS asserts that the subject railing involved in the accident was in compliance with the applicable building code. In addition, Cimmino testified that he never observed any concertgoer fall from any of the balconies at the Venue, nor did he ever receive any complaints that the height of the railings was so low as to pose a risk of falling. Moreover, as less than 10 seconds elapsed between the time that the Patron approached the railing and the time that he fell over it, there is nothing that could have been done to prevent the accident.

In opposition, plaintiff argues that, while the balcony box railing may barely have met the minimum height requirement of the 1968 New York City Building Code, the railing should have met the reasonable, widely accepted and long-standing national industry and current New York City Building Code requirement of 42 inches, which dates back as far as 1973, which is prior to the time of the last renovations to the Venue. This is so, especially in light of Meltzer's expert testimony that, at barely 30 inches high, the railing stood below the center of gravity of a standing patron.[1]

Initially, as MCS argues, as less than 10 seconds elapsed between the time that the Patron unexpectedly approached the subject railing and the time that he fell over it, it cannot be said that

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[1]It should be noted that the height of the patron that fell on plaintiff was never established, and, therefore, a question of fact exists as to whether the balcony railing was below his center of gravity.

the accident could have been prevented with better security guard placement.

However, that said, MCS is not entitled to dismissal of the negligence claim against it because a question of fact does exist as to whether MCS's failure to raise the subject railing, so as to be in compliance with the most recent industry and national standards, contributed to the accident. Contrary to MCS's argument, that it was not negligent because the railing was in compliance with the building code at the time the Venue was built, the issue of whether the subject railing was in "compliance with the applicable statutes and regulations is not dispositive of the question whether [MCS] satisfied its duties under the common law" (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]). It is well settled that a building code violation is not the only determinative factor in assessing whether the premises was in a reasonably safe condition. Rather, in common-law negligence, "the absence of such violations only absolve[s] the defendants of the mandatory duty that such provisions might otherwise impose, and is not dispositive of the plaintiff's allegations based on common-law negligence principals" (*Zebzda v Hudson St., LLC*, 72 AD3d 679, 680-681 [2d Dept 2010] [internal citations omitted]; *Alexis v Motel Oasis*, 143 AD3d 926, 927 [2d Dept 2016]).

In addition, as plaintiff argues in his opposition, a question of fact exists as to whether it was foreseeable that the Patron might fall over the subject 30-inch-high balcony railing, in light of the fact that it was allegedly situated below a normal person's center of gravity, and in light of the fact that the area behind the railing had no fixed seating and patrons, who were consuming alcohol and dancing, were permitted to stand at the railing.

As the Court of Appeals stated in *Derdiarian v Felix Contr. Corp.* (51 NY2d 308 [1980]):

> "[w]here 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. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act, which breaks the causal nexus. Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve"

(*id.* at 315 [internal citations omitted]; *see also Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 371-372 [2d Dept 2014]).

As the instant case turns upon questions of foreseeability, it is for the trier of fact to resolve the question of whether MCS's alleged negligence, in failing to raise the height of the subject railing, substantially caused the accident (*Gurmendi v Perry St. Dev. Corp.*, 93 AD3d 635, 638 [2d Dept 2012] [Court held that "there remain[ed] a triable issue of fact as to whether it was foreseeable that materials falling from defective safety netting installed overhead would strike a person nearby and that this person could be injured while attempting to avoid such falling materials"]).

Thus, MCS is not entitled to dismissal of the negligence claim against it.

Plaintiff's Negligence Claims Against Bowery and International (motion sequence numbers 005 and 006)

In their separate motions, Bowery, the concert promoter, and International, the security agency hired by MCS to provide guards for the event, move to dismiss plaintiff's negligence claims against them on the ground that they did not owe plaintiff a duty of care. To that effect, they were not in privity of contract with plaintiff, and plaintiff was not an intended third-party beneficiary to their contracts with MCS (*see Perez v Hunts Point I Assoc., Inc.*, 129 AD3d 498,

499 [1st Dept 2015] [summary judgment granted to security guard company "on the ground that plaintiff was not a third-party beneficiary of the contract" between company and owner of the building]; *Rudel v National Jewelry Exch. Co.*, 213 AD2d 301, 301 [1st Dept 1995] [liability not imposed on a defendant security guard company where the "[p]laintiffs [were] not third-party beneficiaries of the contract between defendant managing agent and defendant security guard company"]; *Haston v East Gate Sec. Consultants*, 259 AD2d 665, 665 [2d Dept 1999]).

To explain, as "a finding of negligence must be based on the breach of a duty, a threshold question . . . is whether [Bowery and International] owed a duty of care to [plaintiff]," a non-party to the contractual arrangement between these two defendants and MCS (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *see Church v Callanan Indus.*, 99 NY2d 104, 110 [2002]). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138).

In *Espinal*, the Court identified three sets of circumstances, which serve as exceptions to this general rule (*id.* at 140; *Church,* 99 NY2d at 111). The first set of circumstances arises "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111, citing *Espinal*, 98 NY2d at 139, 141-142; *Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414, 415 [1st Dept 2014]). This conduct has also been described as "'launch[ing] a force or instrument of harm'" (*Church*, 99 NY2d at 111, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]).

In opposition, plaintiff argues that Bowery and International launched an instrument of harm by failing to make sure that security guards were placed within the balcony boxes, and not

just at the entrances, and by making sure that alcoholic beverages were not served to rowdy concertgoers. However, such alleged failures did nothing to make the concert less safe, only safer than it was at the time of the accident. As the Court of Appeals in *Church* reasoned, it is well settled that

> "tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation. If liability invariably follows nonperformance of some safety-related aspect of a contract, the exception would swallow up the general rule against recovery in tort based merely upon the failure to act as promised"

(*Church*, 99 NY2d at 112 [guardrail installer owed no duty of care to nine-year-old passenger plaintiff who sustained serious spine injuries when the vehicle careened off the highway and down an embankment. Court held that guardrail installer's "failure to install the additional length of guardrail did nothing more than neglect to make the highway . . . *safer*–as opposed to less safe–than it was before the repaving and safety improvement project began"]). Therefore, these defendants do not owe a duty of care to plaintiffs on this ground.

"The second set of circumstances giving rise to a promisor's tort liability is where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*Church*, 99 NY2d at 111, citing *Espinal*, 98 NY2d at 140). Here, that plaintiff did not rely on Bowery and International's continuing performance of their general contracted duties is not in dispute.

"Third, [Courts] have imposed tort liability upon a promisor 'where the contracting party has entirely displaced the other party's duty to maintain the premises safely'" (*id.* at 112, quoting *Espinal*, 98 NY2d at 140, 141 [liability for the plaintiff's slip and fall injuries were not imposed on a snow removal contractor, where the owner effectively "at all times retained its landowner's

duty to inspect and safely maintain the premises"]; *Palka v Service Master Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994] [liability for plaintiff's injuries imposed upon a maintenance company, where its contract with the hospital was "comprehensive and exclusive" in regard to the inspection and repair of the defectively maintained fan that fell on her]).

Here, a review of the deposition testimony in this case, as well as the contracts between Bowery and MCS, and International and MCS, reveals that the subject contracts were clearly not the type of contracts that were "comprehensive and exclusive," so as to qualify under the requirements of the third Espinal exception. It was MCS, and not Bowery or International, that was in charge of overall security at the Venue, and MCS determined the placement of the security officers at the Venue and regulated the sale of alcoholic beverages to the patrons. Therefore, as Bowery and International never completely displaced MCS's common-law duty to maintain safety at the Venue, these defendants owed no cognizable duty to plaintiff, so as to be held liable in negligence for his injuries on this ground.

Thus, as Bowery and International did not owe a duty of care to plaintiff, these defendants are entitled to dismissal of the negligence claim against them.

The MCS Defendants' Cross-Claims for Common-Law Indemnification Against Bowery (motion sequence numbers 004 and 005)

The MCS defendants cross-move for summary judgment in their favor on their cross claim for common-law indemnification against Bowery. Bowery cross-moves to dismiss all cross-claims for common-law indemnification against it.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also

prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

As Bowery points out, the MCS defendants' only two references to their cross-claim for common-law indemnification against Bowery are found in the notice of motion and the wherefore clause of the attorney's affirmation in support. As these defendants set forth no arguments in support of summary judgment in their favor on this cross-claim, they have not established their burden of proof that any negligence on the part of Bowery caused the accident, and therefore, that they are entitled to summary judgment in their favor on said cross-claim.

That said, in opposition to Bowery's motion to dismiss said cross-claim, the MCS defendants argue that at least a question of fact exists as to whether Bowery's negligence caused the accident, because Bowery never requested that guards be placed inside the balcony box. However, as noted previously, the testimonial evidence in the record establishes that MCS, and not Bowery, was the entity charged with the placing the guards at the Venue. Further, a review of the record reveals no other evidence of negligence on the part of Bowery that might have contributed or caused the accident.

Thus, the MCS defendants are not entitled to summary judgment in their favor on their cross-claim for common-law negligence against Bowery, and all cross-claims for common-law indemnification must be dismissed as against Bowery.

The MCS Defendants' Cross-Claim for Contractual Indemnification Against Bowery and Bowery's Cross-Claim for Contractual Indemnification Against MCS

The MCS Defendants move for summary judgment in their favor on their cross-claim for contractual indemnification against Bowery. Bowery moves for dismissal of said cross-claim against it. In addition, Bowery moves for summary judgment in its favor on its cross-claim for contractual indemnification against MCS, and MCS moves for dismissal of said cross-claim against it.

Additional Facts Relevant To This Issue:

Pages six and seven of the MCS/Bowery Agreement set forth competing indemnification provisions. The first indemnification provision, which sets forth when Bowery must indemnify MCS (the Bowery Indemnification Provision), states:

> "[Bowery] agrees to indemnify and hold [MCS], its ownership, affiliates, officers, directors, employees and agents harmless from and against any and all claims, liabilities, judgments, costs and expenses, including reasonable attorneys' fees, arising out of [Bowery's] use of [the Venue] or arising from any acts or omissions of [Bowery's] vendors, caterers or other subcontractors, other than for those actions or omissions by [MCS] that may evidence gross negligence or willful misconduct as determined by a court of competent jurisdiction"

(the MCS defendants' notice of motion, exhibit F, the MCS/Bowery Agreement, the Bowery Indemnification Provision).

The second indemnification provision, which sets forth when MCS must indemnify Bowery (the MCS Indemnification Provision), states:

> "[MCS] agrees to indemnify and hold [Bowery] from and against any claims, liabilities, judgments, costs and expenses, including reasonable attorneys' fees, arising solely out of [MCS's] acts and omissions as the lessee and operator of [the Venue] as provided for under New York law, in addition to any claims that may arise solely due to the Production and Security Services that [MCS] may provide in accordance with the terms of this Agreement, and any and all claims that may

> arise under New York State Dram Shop laws related to [MCS's] sale of alcohol at the Event"

(the MCS defendants' notice of motion, exhibit F, the MCS/Bowery Agreement, the MCS Indemnification Provision).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

As to whether Bowery owes the MCS defendants contractual indemnification, it should be noted that the Bowery Indemnification Provision provides that Bowery indemnify MCS for claims "arising out of [Bowery's] use of [the Venue] . . . other than for those actions or omissions by [MCS] that may evidence gross negligence or willful misconduct as determined by a court of competent jurisdiction" (the MCS defendants' notice of motion, exhibit F, the MCS/Bowery Agreement, the Bowery Indemnification Provision).

Here, it is undisputed that the accident arose from Bowery's use of the Venue, i.e. it

served as the promoter for the concert underway at the time of the accident. However, as questions of fact exist as to whether MCS was negligent in failing to raise the height of the guardrail, it cannot be determined at this time whether MCS was guilty of gross negligence or willful misconduct in regard to the accident.

Thus, the MCS defendants are not entitled to summary judgment in their favor on the cross-claim for contractual indemnification against Bowery, and Bowery is not entitled to dismissal of said cross-claim against it.

As to whether MCS owes Bowery contractual indemnification, pursuant to the MCS Indemnification Provision, MCS must indemnify Bowery for any claims "arising solely out of [MCS's] acts and omissions as the lessee and operator of [the Venue] . . . and any and all claims that may arise under New York State Dram Shop laws related to [MCS's] sale of alcohol at the Event" (the MCS defendants' notice of motion, exhibit F, the MCS/Bowery Agreement, the MCS Indemnification Provision).

Here, a question of fact exists as to whether MCS was solely responsible for the accident. In addition, it is has not been sufficiently established that the sale of alcohol contributed to the cause of the accident, so as to implicate the New York State Dram Shop laws.

Thus, Bowery is not entitled to summary judgment in its favor on its cross-claim for contractual indemnification against MCS, and MCS is not entitled to dismissal of said cross claim against it.

The MCS Defendants' Cross-Motion for Breach of Contract For Failure to Procure Insurance Against Bowery

The MCS defendants move for summary judgment in their favor on their cross-claim for

breach of contract for failure to procure insurance against Bowery. Bowery cross-claims for dismissal of said cross-claim against it.

Additional Facts Relevant to this Issue:

On page seven of the MCS/Bowery Agreement, there is an insurance procurement provision requiring Bowery to purchase the following general liability coverage:

> "(i) Commercial General Liability: $2,000,000. Each Occurrence; $3,000,000 General Aggregate for death or injury to any person and/or damage to any property or interest . . . . Coverage . . . shall at all times provide coverage on a primary basis, and not be contributory to or excess over any other insurance available to [MCS], and shall name [MCS], its corporate ownership . . . subsidiaries, related & affiliated entities as Additional Insureds"

(the MCS defendants' notice of motion, exhibit F, the MCS/Bowery Agreement).

On January 10, 2014, MCS's insurance carrier, Travelers Insurance, sent a letter to Bowery's insurance company, American Specialty Insurance ("American"), "following up concerning [its] tender of this matter by our insured to the concert promoter, [Bowery]" (the Letter) (MCS's notice of motion, exhibit L, the Letter). The Letter reiterated Traveler's demand that Bowery/American defend the MCS defendants, noting that the indemnification provision contained in the MCS/Bowery Agreement requires that Bowery defend and hold harmless MCS for claims arising out of Bowery's use of the Venue. In addition, said indemnification provision does not require a showing of negligence on the part of Bowery.

Here, as Bowery argues, the MCS defendants are not entitled to summary judgment in their favor on their claim for breach of contract, because Bowery fulfilled its insurance procurement obligations under the MCS/Bowery Agreement by purchasing primary and excess insurance policies, each providing additional insured status to those parties, as required by the

agreement.

A party is not liable to another for contractual indemnification or breach of contract under the insurance procurement provisions of a contract when that party fulfills its contractual obligation to procure proper insurance for the benefit of the other party (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 299 [1st Dept 1996] [third-party defendant was not liable to appellants for breach of contract for failure to procure insurance "inasmuch as [it] had fulfilled its contractual obligation to procure proper liability insurance on behalf of appellants"]; *see also Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

It should be noted that the MCS defendants put forth that their insurance company, Travelers Insurance, sent a tender letter to Bowery, and, to date, Bowery's insurance carrier has not accepted their defense and indemnification. However, it is of no consequence as to whether Bowery's insurance carrier accepted the tender of the MCS defendants, as the ultimate issue is whether Bowery purchased the required liability coverage and that the policies named the MCS defendants as additional insureds in regard to them.

Thus, as Bowery obtained the proper insurance, the MCS defendants are not entitled to summary judgment in their favor on their cross-claim for breach of contract for failure to procure insurance against Bowery, and Bowery is entitled to dismissal of said cross-claim against it.

The Cross-Claims Against International (motion sequence number 006)

As argued by International, International is entitled to dismissal of all cross-claims against it sounding in common-law indemnification, on the ground that no negligence on its part caused or contributed to the accident, and it owed no duty of care to plaintiff. In addition, as International argues, because it did not contract with Bowery or Strike Force, it is entitled to

dismissal of any cross-claims asserted against it by them for contractual indemnification.

That said, International did contract with MCS, and, yet, International offers no argument in support of its request for dismissal of MCA's cross-claim for contractual indemnification against it. Thus, as it has not met its prima facie burden on this issue, International is not entitled to dismissal of MCS's cross claim against it for contractual indemnification.

Plaintiff's Cross Motion to Strike the MCS Defendants' Answer for Spoliation

Plaintiff cross-moves to strike the MCS defendants' answer, or, alternatively, for a sanction of precluding evidence on the security issues in this case, on the ground of spoliation of evidence. In support of his cross-motion, plaintiff argues that, while the Venue was equipped with multiple video surveillance cameras with different vantage points, just under a minute of footage, from a camera located at the rear of the third-floor balcony, was preserved. Plaintiff argues that the missing surveillance footage would have shown, among other things, whether the balcony box was overcrowded, the placement of the security guards, how close to the railings the patrons were allowed to stand, and whether there was a problem with intoxicated patrons due to alcohol and drugs. Plaintiff also asserts that the failure to preserve said video prevented him from identifying the Patron, depriving him of the ability to sue him as a named defendant.

As the Court noted in *De Los Santos v Polanco* (21 AD3d 397 ([2d Dept 2005]):

> "The Supreme Court has broad discretion in determining the appropriate sanction for spoliation of evidence. Because striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness. Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading. A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his

or her case or defense

(*id.* at 397-398 [internal citations omitted]; *Klein v Ford Motor Co.*, 303 AD2d 376, 377 [2d Dept 2003]; *New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 653 [2d Dept 2001]).

Here, plaintiff is neither entitled to an order striking the MCS defendants' answer, nor a sanction of precluding evidence on the security issues in this case. As he acknowledges, plaintiff did not make contact with the MCS defendants in regard to the preservation of said surveillance videos until January 11, 2013, approximately two and a half months after the accident. In addition, plaintiff brought a pre-action disclosure petition on April 13, 2013, which sought, among other things, surveillance video from all of the cameras which were filming at the Venue during the concert. This included video from the lobby and outside, on 34th Street.

Importantly, a July 15, 2013 stipulation, so ordered by the court, resulted in the withdrawal of that pre-action disclosure petition, in consideration of the MCS defendants exchanging the Video and the name of the security company contracted for the event. Thereafter, in full compliance, the MCS defendants provided a copy of the Video and the name of the security contractor, International. It should be noted that the Video is also attached as an exhibit to the instant motions.

In any event, the relevant information that plaintiff seeks can be ascertained through documentary and testimonial evidence contained in the record. "Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate" (*Klein v Ford Motor Co.*, 303 AD2d at 377).

Here, Heying, of International, and Hartford, of MCS, testified to the number of

International guards at the concert, as well as to the fact that MCS was in charge of their placement. In his affidavit, Ferrant, MCS's vice president of operations, also maintained that Hartman directed the placement of International's security guards. In addition, Kensak testified that, as the boxes were small, and, as there was only one way to access them, the guards would have been posted at the entrances to the boxes, and not inside them. Sichel's testimony also established that, just prior to the accident, two guards with flashlights were standing near the subject balcony box.

As to the overcrowding issue, Kensak's testimony, which was based upon the number of tickets scanned, established the seating capacity at the Venue and the number of concert attendees. In addition, Sichel testified that she observed that the balcony box had a "normal amount of people" (Sichel tr at 26). From her seat in the upper tier of the Venue, Sichel took photographs of the subject balcony box immediately after the accident. These photographs, which are annexed to the MCS defendants' opposition papers, depict the balcony box as not overcrowded. As to the issue of whether additional video might show the identity of the Patron, as well as his demeanor and actions prior to the accident, Sichel testified as to his actions prior to his fall, and the Video shows the Patron not holding a beverage in his hand and dancing and waving at the time that he approached the railing.

Thus, plaintiff's cross-motion is denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of the motion of defendants Manhattan Center Studios, Inc. ("MCS") and The Holy Spirit Association for the Unification of World Christianity's ("HSA")

(together, the MCS defendants) (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against HSA only is granted, and the complaint and all cross-claims are dismissed as against HSA; and it is further

ORDERED that the part of the MCS defendants' motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against them is denied; and it is further

ORDERED that the part of defendant Bowery's motion (motion sequence number 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross-claims against it for common-law indemnification and breach of contract for failure to procure insurance is granted, and the complaint and these cross-claims are dismissed as against Bowery, and the motion is otherwise denied; and it is further

ORDERED that defendant International Protective Group, LLC's ("International") motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it is granted, with the exception of MCS's cross-claim against it for contractual indemnification, and the complaint and said cross-claims are dismissed as against International; and it is hereby

ORDERED that plaintiff Yosef Allen's cross-motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 7, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.