High v Taylor
2020 NY Slip Op 32963(U)
September 11, 2020
Supreme Court, Broome County
Docket Number: EFCA2017001268
Judge: Eugene D. Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 25th day of June, 2020, by Skype.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

LINDA HIGH, individually and as Administrator of the Estate of JAMES E. HIGH, JR., Deceased, and as Guardian and Fiduciary of T.Q.H., a minor,

Plaintiffs,

vs.

JOSHUA M. TAYLOR and/or
TRIPLE CITIES NU TEMPLE & IBOE OF W TEMPLE,
and/or ANTLER LODGE #494, and/or
TRIPLE CITIES NU TEMPLE #1344, and/or
IMPROVED BPOE OF THE WORLD INC.-ELKS UNITED,
and/or IMPROVED BENEVOLENT, PROTECTIVE ORDER
OF ELKS OF THE WORLD, INC, and/or
I.B.P.O.E OF THE W.,

Defendants.

DECISION AND ORDER

Index No. EFCA2017001268

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider the motion of Defendant Improved BPOE of the World, Inc.-Elks United ("Elks United")[1] seeking summary judgment pursuant to CPLR 3212 dismissing the complaint, or an Order of contribution and common law indemnification against the other named Defendants[2]; and Plaintiff's cross-motion for summary judgment against Elks United. For the reasons set forth below, Defendant's motion for summary judgment dismissing the complaint is denied, and Defendant's motion for an Order of contribution or indemnification is denied without prejudice; Plaintiff's cross-motion for summary judgment is also denied.

BACKGROUND FACTS

In the early morning hours of July 24, 2015, James E. High, Jr. was fatally shot in or near a building owned by Elks United, located at 201-203 Chenango Street, in Binghamton, NY. The building was the social club for the local Elks Club and was known as the Antler Lodge, and contained a bar area, kitchen and some other rooms. The Antler Lodge was for members only, but non-members would be allowed in if they knew a member. Mr. High had gone to the Antler Lodge with his cousin Anthony Carter. After a disturbance inside the bar, Mr. High was shot outside the bar. Joshua M. Taylor ("Taylor") was subsequently arrested in connection with the shooting and following a jury trial, Taylor was convicted of second degree murder.

On June 19, 2017, Plaintiff commenced this action for personal injury and wrongful death against Elks United and various entities associated with Elks United, as well as Taylor. Plaintiff contends that the Antler Lodge had a long history of criminal activity and violence occurring on

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[1]The moving Defendant's papers indicate that the proper entity name is Improved BPOE of the World, Inc. d/b/a Elks United. For purposes of the motion and cross motion, the Court will refer to this entity as Elks United.

[2]Elks United also sought summary judgment with respect to Plaintiff's claim under the Dram Shop Act, but Plaintiff withdrew that claim in her opposition papers. Therefore, the Court need not discuss that aspect of the current motion.

and around its premises, and Elks United failed to take proper precautions or implement adequate security measures to ensure the safety of its patrons. Plaintiff alleges that the risk of serious injury to patrons such as Mr. High was foreseeable by Elks United. On October 25, 2017, Elks United filed a Verified Answer with Affirmative Defenses, and Cross-Claims against the other co-defendants. Defendant Improved Benevolent Protective Order of Elks of the World, Inc. also filed an Answer, but has not appeared in connection with these motions.

Taylor's criminal trial took place in Broome County Court from September 19, 2017 to September 28, 2017, and the full trial transcript has been included as part of Elks United's motion. Not surprisingly, most of the important testimony and evidence was also introduced in the criminal action. On this motion, Elks United also submitted the transcript from the November 14, 2019 deposition of Christina Archie, who was President of the women's section of the Binghamton Elks club; as well as the deposition testimony from Linda High and T.Q.H, Mr. High's mother and his son, respectively.

Elks United seeks summary judgment dismissing the complaint, arguing the shooting of Mr. High was neither foreseeable nor reasonably predictable based on prior occurrences of the same or similar criminal activity at the Antler Lodge or immediate vicinity. Elks United also claims that the shooting actually took place off the Antler Lodge premises on public property. Therefore, Elks United claims that it had no duty to decedent on public property and no control over that area. Elks United contends that it did not have any notice from past experiences that there was a likelihood of conduct on the part of Mr. Taylor that could endanger the safety of Mr. High. Elks United also alleges that it had taken precautions to prevent violence on the premises by virtue of the fact that everyone who entered the Antler Lodge was searched for weapons prior to entry.

Plaintiff filed a cross-motion seeking summary judgment against Elks United, arguing that the evidence establishes the existence of prior criminal activity at the Antler Lodge in the months prior to Mr. High's death, making criminal activity reasonably predictable and foreseeable, yet Elks United failed to take minimal precautions to prevent such violence and

protect their patrons. The failures included failing to properly train and equip security employees. In the alternative, Plaintiff argues that, at the very least, there are questions of fact which preclude granting summary judgment to Elks United.

WITNESSES AND TESTIMONY

Mr. High and Mr. Carter went to the Antler Lodge around 11:00-11:30 pm on July 23, 2015. One of their friends, Abdul Razzaq, contacted them to see where they were, and then he came to join them at the Antler Lodge, arriving sometime around midnight. Mr. Velez and his friend, Danny Carabello walked to the Antler Lodge, also arriving sometime after midnight. Mr. Taylor was also present at the Antler Lodge that evening. Some disagreement arose between Mr. High and Mr. Velez, resulting in Mr. High being ushered outside the bar to cool off and Mr. Velez being taken further back in the bar. A short time later, Mr. High was shot. In the chaos which resulted following the shooting, Mr. Velez also sustained a significant laceration to his head.

Testimony at the criminal trial established that there was an outside door at the Antler Lodge, fronting Chenango Street and leading to an inside vestibule area. There was a second door inside the vestibule, which had to be opened from the inside when someone seeking entrance arrived and rang a bell. Leroy Minus, a long time member of the Elks Club, testified that he was outside smoking a cigar, and saw Mr. High on the sidewalk arguing with Jervey Rollins, who was a cook at the Antler Lodge. There were other people present, but Mr. Minus could not recall who was there. This was after Mr. High had been escorted outside to cool off. Mr. Minus heard shots, but stated he did not see the shots fired. After hearing the gunshots, he saw Mr. Taylor holding a gun in his hands and pointing it at Mr. High. According to witnesses, despite being shot, Mr. High still struggled with Mr. Taylor. Mr. High then attempted to re-enter the Antler Lodge, but was unable to get back in. He collapsed into the arms of his cousin in the vestibule. Someone pulled a car around to take Mr. High for medical treatment, but by that time police had arrived. The first officer on the scene saw the rear passenger door opened and located

Mr. High in the road on Chenango Street. The officer determined that Mr. High should be transported by ambulance. He was taken to a local hospital where he succumbed to his injuries.

Mr. Razzaq testified at the criminal trial that he had contacted Mr. High and/or Mr. Carter to see where they were and what they were doing. After hearing they were at the Antler Lodge, Mr. Razzaq went to go meet them, and arrived at the Antler Lodge around midnight or shortly thereafter. He located Mr. High and Mr. Carter and had some conversation with both of them. A short while later, he noticed an argument between some of the patrons, including Mr. High and Mr. Velez. According to Mr. Razzaq, Mr. High was taken outside to talk with one of the managers to cool off. Mr. Razzaq remained inside, but a little while later, he heard gunshots. He started to go outside, and Mr. High was coming back in, warning Mr. Razzaq not to go outside. They were apparently in the vestibule area at that point, and Mr. Razzaq noticed that Mr. High was bleeding. He did not see any other people bleeding, or see anyone get stabbed or slashed in the vestibule. He assisted Mr. High to the car that had pulled around the front, but Mr. High did not want to get in the car. Eventually, they laid Mr. High on the ground in the road beside the car.

Larry Smith was working at the front door that evening, and was providing security. Sometimes he would also collect the cover charge, if there was one for that night. As part of his duties, he would search people for weapons as they entered. However, he admitted that he did not have any specific training with respect to searching people for weapons and had only been working at the Antler Lodge for about a week. He also testified that the handheld metal detector, or wand, was not working on that night. Mr. Smith stated he did not find any weapons on anyone coming into the bar that night, although he admitted it was possible that someone could have brought in a weapon and he just did not detect it. He observed that Mr. High and Mr. Velez had gotten into a dispute at the bar and Mr. Smith restrained Mr. Velez and moved him to the back of the bar area while other people, including Mr. Rollins, escorted Mr. High outside. Within a short time Mr. Smith heard gunshots. He observed Mr. High coming back to the vestibule area of the Antler Lodge, and he could see that Mr. High had been shot.

Mr. Carabello testified that he went to the Antler Lodge that evening with his friend, Mr.Velez. He observed a disturbance inside the bar involving Mr. High and Mr. Velez, and Mr. Carabello helped usher Mr. High outside to try to defuse the situation. Also outside at that time were Mr. Taylor and a few other people. Mr. High and Mr. Taylor were talking but then, according to Mr. Carabello, Mr. High threw a punch at either Mr. Taylor or Mr. Rollins. Mr. Carabello then heard some gunshots and ran back into the bar area and attempted to lock the door. Mr. High and Mr. Taylor were still scuffling but eventually Mr. High made his way back to the entryway and Mr. Carabello could see that he was injured. He also confirmed that Mr. Rollins went to get his car and brought it around front to take Mr. High to the hospital.

Pedro Martinez testified that he had ridden his bike over to the Antler Lodge, but was too young to get in. He was out front with Mr. Minus when he heard a disturbance coming from the Antler Lodge. There was a fight and Mr. High was involved with some other people. Mr. Martinez heard a shot and started to run. He saw someone with a hooded sweatshirt extend his arm and he heard another gunshot. He saw Mr. High punch the person in the face, and then Mr. High jumped over a guardrail between the street and sidewalk and collapsed in the Elks hallway.

Mr. Velez also testified at the criminal trial. He had walked to the Antler Lodge with Mr. Carabello and met up with Mr. Taylor, whom he described as a close friend. Mr. Velez had some words with Mr. High and the bouncer separated the two, with Mr. High being taken outside and Mr. Velez was pushed to the back of the bar. He then tried to leave, but as he was in the vestibule, he was cut in the head by a box cutter. He was cut by someone from behind him, and was unable to identify the perpetrator.

Upon arrival at the scene, police began to search for evidence and suspects. An employee of the Antler Lodge, Mitchell Lane, was mopping up blood in the vestibule and was ordered by police to stop as it could destroy relevant evidence. The blood samples from the vestibule were later analyzed and experts testified at the criminal trial that the blood did not belong to Mr. High or Mr. Taylor. A gun was found beneath some stairs in the back parking lot area. Police also located a shell casing in the road on Chenango Street, about 30 feet from the door to the Antler Lodge.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

In this case, Plaintiff's complaint alleges that Elks United had a duty to protect invited guests from reasonably foreseeable actions that could cause harm to those invitees, like Mr. High. The allegations require consideration of the concepts of duty and foreseeability. The "threshold question" in any negligence action is whether a defendant owes "a legally recognized

duty of care to plaintiff." *Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222, 232 (2001). The existence and scope of duty present a "legal issue for the courts to decide." *Oddo v. Queens Vil. Comm. for Mental Health for Jamaica Comm. Adolescent Program, Inc.*, 28 NY3d 731, 735 (2017). "[F]oreseeability and duty are not identical concepts" ... as "[f]oreseeability merely determines the scope of the duty once the duty is determined to exist." *Pink v. Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 998 (2016), *quoting Maheshwari v. City of New York*, 2 NY3d 288, 294 (2004); *Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222; *Pulka v. Edelman*, 40 NY2d 781, 785-786 (1976) ("Foreseeability should not be confused with duty....[F]oreseeability is a limitation on duty"); *Holdampf v. A.C.& S., Inc.*, 5 NY3d 486 (2005).

As a general rule, a "defendant ... has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control." *Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d at 233 (citations omitted). However, a duty may be found where "the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm." *Id.* at 233; *Davis v. South Nassau Communities Hosp.*, 26 NY3d 563, 572 (2015); *Oddo v. Queens Vil. Comm. for Mental Health for Jamaica Adolescent Program, Inc.*, 28 NY3d 731. As it pertains to premises, it is well established that "'New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition.'" *Maheshwari v. City of New York*, 2 NY3d 288, 294 *quoting Tagle v. Jakob*, 97 NY2d 165, 168 (2001) (other citation omitted); *D'Amico v. Christie*, 71 NY2d 76 (1987). As a "natural corollary" to the landlord's "common-law duty to make the public areas of his property reasonably safe for those who might enter" [*Nallan v. Helmsley-Spear, Inc.*, 50 NY2d 507, 519 (1980)], "[a]n owner is obligated to take reasonable precautionary measures to minimize the risk of criminal acts and make the premises safe for visitors when the owner is aware, or should be aware, that there is a likelihood of conduct on the part of third parties that would endanger visitors." *Gentile v. Town & Vil. of Harrison, N.Y.*, 137 AD3d 971 (2nd Dept. 2016) (citations omitted); *Haire v. Bonelli*, 107 AD3d 1204, 1204-1205 (3rd Dept. 2013); *see James v. Jamie Towers Hous. Co.*, 99 NY2d 639 (2003); *Miller v. State*, 62 NY2d 506 (1984); *Davis v. Commack Hotel, LLC*, 174 AD3d 501, 502 (2nd Dept. 2019) *quoting Bryan v. Crobar*, 65 AD3d 997, 999 (2nd Dept. 2009) ("A possessor of real property is under a duty to maintain reasonable

security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties."). Thus, the owner of a public establishment has a duty to act reasonably to control the acts of a third party so as to protect its patrons, but does not have a duty to protect against unforeseeable and unexpected assaults. *Ash v. Fern*, 295 AD2d 869 (3rd Dept. 2002); *Stafford v. 6 Crannel St., Inc.*, 304 AD2d 997 (3rd Dept. 2003); *see Milton v. I.B.P.O.E. of the World Forest City Lodge, #180*, 121 AD3d 1391 (3rd Dept. 2014). It is at this point that duty, foreseeability and proximate cause begin to overlap and blur. An owner should not be responsible for the unexpected intervening acts of a third party that cause harm to a patron because the causal nexus is broken, but it does not offend principles of fairness to hold an owner accountable when the owner knowingly permits unsavory actors and activities on its premises that create or foster an unsafe situation that ultimately leads to harm to a patron.

A landowner must take minimal precautionary measures to secure the premises if it has notice of criminal activity that may cause harm to a patron. *See Mason v. U.E.S.S. Leasing Corp.*, 96 NY2d 875 (2001); *Miller v. State*, 62 NY2d 506. To show foreseeability, the Plaintiff must show that the criminal conduct was "'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.'" *Haire v. Bonelli*, 107 AD3d 1204, 1205 *quoting Six Anonymous Plaintiffs v. Gehres*, 68 AD3d 1177, 1178 (3rd Dept. 2009) (other citations omitted); *Novikova v. Greenbriar Owners Corp.*, 258 AD2d 149 (2nd Dept. 1999). "While the prior criminal activity need not have been 'at the exact location where [the] plaintiff was harmed or . . . of the same type of criminal conduct to which [the] plaintiff was subjected,' the inquiry of foreseeability depends upon 'the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question.'" *Haire v. Bonelli*, 107 AD3d at 1205 *quoting Jacqueline S. v. City of New York*, 81 NY2d 288, 294-295 (1993); *Davis v. Commack Hotel, LLC*, 174 AD3d 501; *Bryan v. Crobar*, 65 AD3d 997.

Elks United argues that there is no admissible evidence showing that it knew, or had reason to know, from past experience that criminal activities at the Antler Lodge could lead to Mr. High being shot and killed outside the Antler Lodge. Plaintiff's verified Bill of Particulars alleges that Defendant knew or should have known that violent incidents, some involving injuries

and firearms, took place at the Antler Lodge, including the following: 1) a 2010 shooting involving criminal possession of a handgun; 2) an October 12, 2014 housing code violation; 3) March 1, 2015 incident involving shots fired at the Antler Lodge between patrons; 4) March 13, 2015 incident where a victim reported he was assaulted and robbed at the Antler Lodge; and 5) a June 12, 2015 incident where City police broke up a fight outside the Antler Lodge at a time when the Lodge was operating after the legally permitted hours.

In its motion papers, Elks Club addressed each of these allegations, primarily through the trial testimony and deposition testimony of Ms. Archie, who was President of the female branch of the Elks. She was often at the Lodge and generally oversaw the activities of the bar. If necessary, she would ask people to leave if they had too much to drink, and she generally attempted to keep bad things from happening at the club. She was not at the Lodge on the night of the shooting, so she did not have details of exactly what happened that night. She testified regarding the surveillance cameras that were at different locations inside and outside of the Antler Lodge, which footage she had reviewed, but not at great length. Upon her review, none of the cameras captured the shooting, nor did they show any altercation between Mr. High and Mr. Taylor inside the establishment. With respect to Plaintiff's allegations of similar incidents that happened prior to the shooting, Ms. Archie explained her recollection of those events: 1) she was not aware of any incident in 2010 involving a handgun that took place on or near the property, and if there had been such an incident she was the person police would have contacted; 2) she also did not have any information about a housing code violation in 2014; 3) with respect to the March 1, 2015 incident involving gunshots between patrons, Ms. Archie testified that there were no gunshots inside the Antler Lodge and they had actually come from across the street; 4) on March 13, 2015 there was an incident involving a patron, but Ms. Archie testified that there was no robbery; rather, the patron was "completely drunk and was throwing money and it was all on tape throwing money around the place" and he was removed from the bar; and 5) she did not recall any time in the summer of 2015 that the club stayed opened later than permitted. She denied that there were weekly disturbances at the Antler Lodge prior to the shooting.

Based upon these statements, Elks United contends that a shooting was not foreseeable. Generally, foreseeability is an issue to be resolved by the trier of fact. *Derdiarian v. Felix*

Contracting Corp., 51 NY2d 308 (1980); *Nallan v. Helmsley-Spear, Inc.*, 50 NY2d 507; *Forrester v. Port Auth.*, 139 AD2d 449 (1st Dept. 1988). It may be determined as a matter of law only when the facts are essentially undisputed and only one inference can be drawn from the facts. *Haire v. Bonelli*, 107 AD3d at 1205; *Milton v. I.B.P.O.E. of the World Forest City Lodge, #180*, 121 AD3d at 1392.

Here, even if the Court were to assume that Ms. Archie correctly recounted the events referenced by Plaintiff, the Court cannot conclude as a matter of law that Elks United could not have reasonably foreseen the possibility of a shooting on or near its premises. Her testimony does not rule out foreseeability.

The first two allegations are not terribly relevant on the question of foreseeability of serious crimes. The 2010 event was remote in time and there were no details to establish any similarity with the incident in question. Likewise, the housing code violation is not similar and does not suggest any violent activity.

However, the Plaintiff's next three allegations, coming in the months preceding the murder of Mr. High, are certainly more closely related. Ms. Archie stated that she was aware of an incident concerning shots being fired in March, 2015 but that it had occurred in a parking lot across the street. Whether it had anything to do with the activities of people who had been at the Lodge is unknown, but there was testimony that some people visiting the Antler Lodge would park in that lot. It is geographically close to the Antler Lodge, in a lot used by patrons of the Lodge and it is similar in that it involved a firearm.

There was also a disturbance where someone claims to have been robbed at the Antler Lodge, and although Ms. Archie provided an explanation that she reviewed video surveillance showing a drunk individual "throwing money around the place," the video surveillance was not submitted, and no other details were provided. She conceded some incident occurred, but she had a different explanation as to what transpired. The trier of fact would need to determine the circumstances surrounding that incident and whether it bore any "similarity, proximity or other relationship to the crime in question."

Lastly, Ms. Archie did not have any recollection of the bar staying open past authorized hours, but she was not there all the time. She testified that she was at the Antler Lodge maybe four nights a week, so that would not foreclose the possibility that the bar stayed open late on nights she was not there. She did not provide testimony concerning police being called to break up a fight at the Antler Lodge on June 12, 2015, less than two months before Mr. High was shot. Thus, Elks United has not provided any evidence with respect to that incident.

In appropriate circumstances a defendant can be granted summary judgment if it can establish that there is no proof of similar prior activity, and therefore the defendant's duty never arose. *See e.g. Milton v. I.B.P.O.E of the World Forest City Lodge, #180*, 121 AD3d 1391; *Haire v. Bonelli*, 107 AD3d 1204. However, summary judgment is a drastic remedy which deprives a Plaintiff of his or her day in court, and should be granted only when no genuine triable issue of fact is presented. *Grossman v. Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept. 2002). If there is any question about the presence of a triable issue, the motion should be denied. *Id.* at 226. In this case, Elks United has presented evidence, primarily from Ms. Archie, that there are other explanations as to the prior events. Other possibilities do not conclusively rule out the allegations of significant prior criminal activity. Rather, in this Court's view, they simply raise questions of fact for a jury to determine the details of the prior events and whether those events made subsequent criminal activity "foreseeable." This is not a situation in which there is only one inference that can be drawn from the facts and can be determined as a matter of law. Instead, it presents questions of fact which the trier of fact will need to resolve to determine the extent to which serious injury from the use of a firearem was foreseeable. On this record, Elks United has failed to meet its *prima facie* burden that the injuries were not foreseeable and that it did not have reason to know from past experiences that there was a likelihood of danger to its patrons.

Even if the Court concluded that Elks United had made a *prima facie* case that criminal activity was not foreseaeable, the burden would be shifted to Plaintiff to raise a triable issue of fact as to foreseeability and to oppose summary judgment. In that regard, Plaintiff has pointed to several items that she claims support the conclusion that the prior criminal activity in and around the Antler Lodge created an unsafe situation for patrons and that injuries were foreseeable.

For example, Plaintiff points to the testimony of Justin Frost, who lived in an apartment next to the Antler Lodge. He testified that he heard the commotion on the night Mr. High was shot and he looked out his window and was able to observe the police arriving at the scene. This was not the first time he had heard an incident outside the Antler Lodge which caused him to take notice and look out his window. He testified that it occurred about once a week. That testimony would be in contrast to Ms. Archie who denied there were weekly disturbances. This would present a question of fact to be determined by the jury.

Plaintiff also submitted police reports regarding the prior incidents she claims show that an unsafe situation existed. The reports show that police responded to an incident of possible shots fired near the Antler Lodge on March 1, 2015, although no weapon, victim or suspects were identified. Plaintiff also submitted a police report from March 13, 2015 about a victim who was at the Antler Lodge and stated he was hit in the head with an unknown object and woke up on the bar floor being kicked and stomped on by unknown parties. The alleged victim also supplied an affidavit as part of the police report, supporting his version of events. Although Ms. Archie testified that the video evidence contradicted the patron's allegations, the jury would have to determine which witness is more credible. Lastly, the Plaintiff submitted a police report from an incident on June 12, 2015, where a police officer was posted outside the Antler Lodge and heard a disturbance inside the front door, and a male yelling and threatening a female. The male went back inside and the officer advised that it was after closing time and all the people inside had to leave, which they did.

Although Elks United argues that the police reports are not admissible and should not be considered by the Court, the Court disagrees. "Although a police report generally is admissible as a business record . . . , statements contained in the report concerning the cause of an accident constitute inadmissible hearsay unless the reporting officer witnessed the accident . . . , the reporting officer is qualified as an expert . . . or the statements meet some other exception to the hearsay rule." *Shaw v. Rosha Enters., Inc.*, 129 AD3d 1574, 1575 (4th Dept. 2015), *quoting Huff v. Rodriguez*, 45 AD3d 1430, 1432 (4th Dept. 2007). In this instance, the police records are not submitted to prove the truth of the matter contained therein, but for the purpose of showing that past criminal activity had been reported at the Antler Lodge. Thus, the police reports are not

hearsay evidence, as they are not submitted to show the truth of the matter contained therein. *People v. Romero*, 78 NY2d 355, 361 (1991). In addition, many aspects of the reports are based upon the officers' own observations and would not be hearsay in any event. The June 12, 2015 report is from the officer's own observations. The police reports were also incorporated in a verified Petition from the City of Binghamton's Corporation Counsel in support of an Order to close the Antler Lodge as part of the City's Lockdown Law. Although that application was not made until 2016, the Petition cites and verifies the accuracy of the police reports regarding events in the months prior to the shooting of Mr. High. Additionally, the complaint from the alleged victim of a robbery was made in a sworn statement from that individual. For all these reasons, the Court finds that the police reports may be used for the purpose of showing that past criminal activity had at least been alleged at the Antler Lodge, and that Plaintiff has created a triable issue of fact with respect to foreseeability. Elks United's submissions have not established as a matter of law that it was unaware of facts that would put it on notice that an assault and shooting might occur on its premises.

Having found that there is a question of fact with respect to foreseeability and the scope of the owners' duty to patrons, the Court must proceed to the next step. If a duty is established, the landowner must take minimal precautionary measures to secure the premises if it has notice of criminal activity that may cause harm to a patron. *Mason v. U.E.S.S. Leasing Corp.*, 96 NY2d 875. The type of safety measure that a landlord is reasonably required to provide is "almost always a question of fact for the jury." *Wayburn v. Madison Land Ltd. Partnership*, 282 AD2d 301, 202 (1st Dept. 2001); *Nallan v. Helmsley-Spear, Inc.*, 50 NY2d at 520, n.8.

The Court must view the facts in a light most favorable to Plaintiff as the non-movant [*Cross v. Labomard*, 127 AD3d 1355 (3rd Dept. 2015)], and there are issues of fact as to whether Elks United provided adequate security on the night Mr. High was shot. Elks United did have some protections in place such as a security person or bouncer at the front door, but that person, Mr. Smith, admitted that he did not have any experience in searching people for weapons. He also admitted that due to his lack of experience he could have missed a weapon. Mr. Minus was a member of Elks United for 15-20 years and tried to make sure things ran smoothly, but he did not have any formal security function. Further, the metal detector wand did not work, because

the batteries were drained. Some witnesses testified that they were not searched when they entered that night, or were aware that other people were not searched. Even if it was the policy of the Antler Lodge to search everyone, that apparently was not always followed, and could be some evidence of negligence. *Bryan v. Crobar*, 65 AD3d 997.

Additionally, although there were video cameras placed inside and outside, there was no functioning camera in the vestibule area. The vestibule area was accessible by anyone because the first door, fronting on Chenango Street, was unlocked. The security person/bouncer was placed at the second inside door, so there was no protection in the vestibule area. Plaintiff contends the vestibule is likely where the shooting occurred. The failure to have a functioning camera in that area could be evidence of Elks United failing to provide minimal safety precautions. Plaintiff also claims that the bar was open past the midnight deadline, and Mr. High was shot after midnight. Had the Antler Lodge done a proper security check, the gun which was used to shoot Mr. High would have been found and confiscated from Mr. Taylor; had the bar closed when it was supposed to, the combatants would not have been in the bar together or outside on the street together. On this record, the Court finds a triable issue of fact has been presented about the adequacy of the security provided at the Antler Lodge.

Elks United also contends that it owed no duty in this case because the injury occurred on public property over which it had no control. The Court finds that argument unavailing. As detailed above, the Antler Lodge had several video cameras pointed at various places inside and outside of the club. Unfortunately, none of the cameras captured the shooting. Ms. Archie and Mr. Minus both testified that a camera was placed in the vestibule but did not work. Plaintiff contends that the only area where there was no camera coverage was the vestibule area, and therefore, the shooting must have occurred there. Testimony establishes that Mr. High was definitely in the vestibule area after being shot, although it is possible he was shot elsewhere and gotten himself back to the vestibule. There was evidence in the criminal trial that the shooting may have occurred on the sidewalk area, but in order to reach that conclusion, the Court would have to make credibility and factual determinations, including whether the shooting occurred in the vestibule or on the sidewalk or street. The Court cannot make such a conclusion on a summary judgment motion. These are questions of fact to be resolved by the trier of fact at trial.

Even if this Court were to conclude that the evidence established as a matter of law that the shooting occurred outside the Antler Lodge, that still would not result in summary judgment in favor of Elks United. The testimony shows there was a disturbance between Mr. High and Mr. Velez which started in the bar and resulted in Mr. High being escorted out the front door by members and employees of the Elks United. If Mr. High was standing on the sidewalk outside the Antler Lodge, it in not necessarily true that Defendant owed no duty to him. *See, CB by Suarez v. Howard Security*, 158 AD3d 157 (1st Dept. 2018); *Lippman v. Hines*, 138 AD2d 845, 846 (3rd Dept. 1988); *Robinson v. June*, 167 Misc.2d 483 (Sup. Ct. Tompkins County 1996). In *CB by Suarez*, Defendant's summary judgment motion was denied even though the Plaintiff was injured outside the Defendant's gate. He was seeking entry for safety but the gate was not opened for him. The First Department specifically rejected Defendant's claim that it owed no duty to the Plaintiff because he was not on Defendant's property. Similarly, in *Lippman v. Hines*, the Third Department concluded that Plaintiff had made out a prima facie case of negligence even though the assault and injury occurred just outside the Defendant's tavern.

The fact that a disturbance or melee which starts on a landowner's premises fortuitously spills onto public property should not, in and of itself, satisfy the landowner's duty. *See, Lippman v. Hines*, 138 AD2d 845, 846 ("defendants owed a duty to adequately supervise and control the patrons consuming alcoholic beverages within the area where supervision and control might reasonably be exercised."); *Pierce v. Moreau*, 221 AD2d 763 (1995) (injury occurred just outside tavern's exit); *Tallerico v. EZ-CR Corp.*, 2014 NY Misc LEXIS 1623 (Sup. Ct. Suffolk County 2014); *Matter of Mapp v. City of New York*, 43 Misc.3d 1204(A) (Sup. Ct. Richmond County 2014) (there is a common-law duty of a proprietor to adequately supervise and control the area where its supervision and control might reasonably be expected, and question of fact was presented as to whether proprietor exercised control over adjacent parking lot). There is not sufficient evidence to establish if the Antler Lodge had control over the sidewalk area directly in front of its premises, either for people going outside to smoke (like Mr. Minus), or using it to get to the Antler Lodge parking lot. There were stairs going to the back parking lot and to get to the stairs a patron would come out the front door and walk on the sidewalk to the stairs located on the side of the building. The Court cannot determine at this point, if the Antler Lodge had control over that sidewalk area.

Further, in this case, it was the members or employees of the Elks Club that placed Mr. High outside, and permitted Mr. Taylor, a friend of Mr. Velez, out front as well. Mr. Rollins, an employee, escorted Mr. High outside the bar, and was apparently somewhere in the vicinity of the shooting when it occurred. Mr. Rollins did not testify in the criminal trial as he could not be located by the District Attorney. In any event, it appears the involvement of the Antler Lodge employees extended to outside the building. *See, e.g. Butler v. E.M.D. Enters.*, 261 AD2d 842 (4th Dept. 1999). Thus, it cannot be said that Elks United did not have the ability to supervise and control Mr. Taylor, who was also a patron at the bar, and who the Antler Lodge permitted to go outside with Mr. High. Further, "[w]hen the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs." *Kush v. Buffalo*, 59 NY2d 26 (1983). By ejecting Mr. High from the premises and permitting Mr. Taylor to go outside as well, there is a question of fact as to whether Elks United may have placed him in greater danger. *See,e.g. Fama v. 155 Second Ave Rest. Inc.*, 2007 NY Misc LEXIS 6001 (Sup. Ct. New York County 2007); *Yashar v. Yakovac*, 48 NYS2d 128 (City Court New York County 1944); *cf. Del Bourgo v. 138 Sidelines Corp.*, 208 AD2d 795 (2nd Dept. 1994). The Court finds *Del Bourgo* to be distinguishable because in that case the employee told the combatants to "take it down the block" and did not come outside with them. Here, the evidence supports a conclusion that members and/or employees went outside as well.

Additionally, there is evidence in the record to support a conclusion that the Antler Lodge may have assumed a duty where none had existed, and potentially placed Mr. High in a more vulnerable position than he would have been had no action been taken. *See Nallan v. Helmsley-Spear, Inc.*, 50 NY2d 507. That evidence includes that fact that the employee(s) removed Mr. High from the building where he had friends who may have been able to assist him; and the employee(s) may have maintained a presence on the sidewalk even after Mr. High was removed; and there were others allowed outside, including Mr. Taylor, a good friend of the Mr. Velez and he may have continued the altercation with Mr. High.

Elks United has not established an entitlement to summary judgment in light of the questions of fact as to where the shooting occurred, and the extent to which Antler Lodge

continued to exercise control over that area or over its patrons. Plaintiff has raised triable issues of fact as to whether Elks United could have anticipated or prevented the incident and the reasonableness of the conduct of its members and employees. *See, Boyea v. Aubin*, 65 AD3d 736 (3rd Dept. 2009).

Elks United also seeks summary judgment dismissing Plaintiff's claim that Elks United was negligent in hiring and training its staff. In order "[t]o establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Shor v. Touch-N-Go Farms, Inc.*, 89 AD3d 830, 831 (2nd Dept. 2011); *Stevens v. Kellar*, 112 AD3d 1206 (3rd Dept. 2013). The allegedly deficient supervision or training must be the proximate cause of the injury. *Gray v. Schenectady City School Dist.*, 86 AD3d 771 (3rd Dept. 2011). Here, there is no claim that the actions of the employees of Elks United inflicted the harm to Mr. High. Rather, the claim is that Elks United was negligent in its hiring and training of "security" personnel, and that negligence resulted in a weapon being smuggled into the bar, and that weapon was subsequently used in the shooting of Mr. High.

A negligent supervision or retention claim requires that "[t]he employee also must not be acting within the scope of his or her employment; in that situation the employer could only be liable, if at all, vicariously under the theory of respondeat superior, not for negligent supervision or retention." *Gray v. Schenectady City School Dist.*, 86 AD3d at 773-774 (citation omitted); *Coville v. Ryder Truck Rental*, 30 AD3d 744, 745 (3rd Dept. 2006). It is undisputed that any employees of the Antler Lodge were acting within the scope of their employment. If the employee is acting within the scope of his employment, there can be no claim for negligent hiring or retention. To the extent Plaintiff claims the employees were not given proper training, that is encompassed in the claim that Elks United breached their duty by not providing adequate security measures. As such, Plaintiff's claim for negligent hiring, training or supervision must fail, and accordingly, Elks United's motion for summary judgment as to that cause of action is granted.

Elks United also seeks summary judgment with respect to its claims for indemnification and/or contribution. "The purpose of all contribution and indemnity rules is the equitable distribution of the loss occasioned by multiple defendants. In furtherance of that purpose the courts have granted relief in a variety of cases in favor of the party who, in fairness, ought not bear the loss, allowing it to recover from the party actually at fault." *Mas v. Two Bridges Assocs.*, 75 NY2d 680, 690 (1990). In contribution, liability is apportioned between parties who are responsible for plaintiff's loss. Indemnification involves shifting the entire loss to another and generally requires a showing that a party is free of negligence but held responsible by operation of law and his relation to the actual wrongdoer. The criminal conviction establishes Mr. Taylor as a wrongdoer, but there is nothing that suggests an actual indemnification situation, or that Elks United would be responsible by operation of law for Mr. Taylor's actions. As for any contribution, that would be up to the jury to determine if it were to find any liability against any of the defendants. The jury could, in that instance, apportion liability as between tortfeasors. Therefore, Elks United has not established an entitlement to summary judgment with respect to contribution or indemnification at this point. The Court must also point out that the parties were unable to explain the relationship between any of the Elks defendants. Without the most basic explanation as to the legal relationship amongst these entities which appear to be somewhat interconnected, the Court could not make a determination as to contribution or indemnity. Therefore, Elks United's motion for summary judgment with respect to contribution and/or indemnity is denied without prejudice.

Plaintiff has also filed a cross-motion for summary judgment on the issue of Elks United's liability. However, for the reasons set forth at length above, there are triable issues of fact with respect to duty, foreseeability and proximate cause that also preclude summary judgment for Plaintiff.

CONCLUSION

Based on all the foregoing, it is hereby

ORDERED, that Defendant's motion for summary judgment dismissing the claim for negligent hiring, retention and training of employees is GRANTED; in all other respects, Defendant's motion for summary judgment is DENIED; and it is further

ORDERED, that Plaintiff's claim under the Dram Shop Act is withdrawn and dismissed, and it is further

ORDERED, that Plaintiff's cross-motion for summary judgment is DENIED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: September 11, 2020
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice