At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 6th day of November 2020

PRESENT:
HON. CAROLYN E. WADE,
Justice

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LEONARD NORROW,

Plaintiff,

Index No. 504669/13

-against-

DECISION/ORDER

Seq 15 & 16

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, BRIGHTON SEA BREEZE RESTAURANT, INC., BRIGHTON SEA REEZE CARE, INC. d/b/a TATIANA GRILL, INNA INC., VKMJ INC., 3145 BRIGHTON FOURTH OWNERS CORP. and CASOL REALTY LLC,

Defendants.

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CASOL REALTY LLC.,

Third-Party Plaintiff,

-against-

3152 RESTAURANT INC.,

Third-Party Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendant's and Third-Party Defendant's Motions:

Papers Numbered	
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	1,2
Cross-Motion and Affidavits/Affirmations	
Answering Affidavits/Affirmations	3,4
Reply Affidavits/Affirmations	5,6
Memorandum of Law	

Upon the foregoing cited papers, and after oral argument, defendant/third-party plaintiff Casol Realty, LLC ("Casol Realty") moves for an Order granting it summary judgment, dismissing plaintiff's complaint; or for an order granting it common and contractual indemnification from defendant/third-party defendant 3152 Restaurant, Inc (motion seq. #15). Third-Party defendant 3152 Restaurant, Inc. moves for an Order granting it summary judgment, dismissing the plaintiff's Complaint (motion seq. #16).

The underlying action was commenced by plaintiff Leonard Norrow ("Plaintiff") to recover for injuries that he allegedly sustained on July 23, 2012, as a patron at a restaurant located at 3152 Brighton 6th Street, Brooklyn, New York ("Subject Premises"). Plaintiff, who was seated at an outdoor table, alleged that at approximately 12pm, a man approached him, and hit him over the head with a mug after he refused to buy him a beer. Plaintiff alleges that the defendants[1] were negligent in their operation, management, supervision, security, and control of the property. Defendant Casol Realty, the owner of the Subject Premises, subsequently filed a

[1] The City of New York, 3154 Brighton Owners Corp. were discontinued from the action. Plaintiff was granted a default judgment against Brighton Sea Breeze Restaurant, Inc., Brighton Sea Breeze Café, Inc. d/b/a Tatiana Grill, Inna, Inc. and VKMJ, Inc.

third-party action against its tenant, 3152 Restaurant, Inc., who operated the restaurant.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In support of the instant motion, Casol Realty principally advances the following arguments: a) it is an out-of-possession landlord, and did not have a duty to protect individuals from unforeseen assaults that could not be reasonably anticipated and/or prevented, b) the attack was unexpected, c) it was not contractually obligated to hire security; and 4) the criminal unforeseen act of a third-party assailant proximately caused Plaintiff's injuries.

3152 Restaurant, in partial support and opposition, avers that Plaintiff neglected to sue it in the main action; yet, brought claims against Casol Realty, an out-of-possession landlord, who owed no duty to him. 3152 Restaurant argues that since Plaintiff's case is subject to dismissal on this ground, the third-party action that Casol Realty filed against it should also be dismissed. It adds that if the main action survives, a ruling as to whether it must indemnify Casol Realty would be premature, as a determination has not been made regarding the negligence of the defendants.

In opposition, Plaintiff argues that 3152 Restaurant and Casol Realty were aware of several dangerous criminal acts at the location, and failed to implement minimal security measures. Plaintiff notes that Tatiana Varzar ("Varzar"), the President and chef of the restaurant,

testified at her deposition that during her nineteen years at the establishment, only two incidents transpired. The first incident occurred in 2000 when the restaurant's security stopped a fight. A second occurrence on an unknown date involved a bill dispute, and the police were called to the Subject Premises. However, Plaintiff asserts that Varzar was quoted in New York Times' articles about two other incidents, which she did not mention at her deposition. In particular, approximately one year before Plaintiff was assaulted, a customer was shot during an altercation that occurred on the boardwalk. Thus, Plaintiff maintains that a question of fact exists regarding whether the defendants were aware of previous dangerous criminal acts, and failed to minimize the foreseeable danger to him.

Casol Realty, in rebuttal, argues that statements in newspaper articles constitute inadmissible hearsay. Moreover, it avers that Plaintiff does not contest that it is an out-of-possession landlord that relinquished control to the property. The landlord adds that it had no duty to protect against an unforeseen, extraordinary act by a third-party.

Courts routinely hold that an out-of-possession landlord can not be held liable for injuries that occur on property unless it retained control over the premises or the operation of the business on site (*Archie v. Ma's & Papa Joe's, Inc.*, 70 AD3d 985 [2d Dept. 2010]; *see also* Donohue v. S.R.O. Café, Inc., 300 AD2d 433 [2d Dept. 2002]).

In the instant case, Plaintiff does not dispute that Casol Realty was an out-of-possession landlord, who neither operated, maintained, nor supervised on the Subject Premises. In fact, section 50, subsection A of the lease executed by Casol Realty and 3152 Restaurant provides, "Tenant covenants and agrees to indemnify and save Landlord harmless from and against any and all claims arising during the term of this Lease for damages or injuries to goods, wares, merchandises and property and/or for any personal injury or loss of life in, upon or about the

Demised Premises or on the sidewalks adjoining the Demised Premises" (Exhibit "K" of Casol Realty's motion).

Plaintiff submits website links from newspaper articles with statements allegedly made by Varzar about prior incidents. He maintains that an issue of fact exists as to whether Casol Realty was aware of the likelihood of dangerous conduct by a third party. However, case law provides that the use of statements from newspapers constitute inadmissible hearsay (see *Young v. Fleary*, 226 Ad2d 454 [2d Dept. 1996]; see also *P&N Tiffany Props., Inc. v. Maron*, 16 AD3d 395 [2d Dept. 2005]). Plaintiff has not proffered any legal authority to support their admissibility. Moreover, one of the incidents that Plaintiff mentioned happened twelve years before the subject incident, while another occurred on the boardwalk. The court further credits Casol Realty's unrefuted contention that the newspaper articles were not disclosed during discovery; and that Plaintiff testified that the assault was sudden and unexpected.

Consequently, this court determines that Casol Realty has established a prima facie entitlement to judgment as a matter of law that it was an out-of-possession landlord that does not bear liability for the unforeseeable incident.

Accordingly, based upon the above, Casol Realty's Motion for Summary Judgment is **GRANTED to the extent** that the Complaint is dismissed against it (motion sequence #15). Since the main action is dismissed against Casol Realty, the third-party action is also dismissed. Thus, third-party defendant 3152 Restaurant's Motion for Summary Judgment is **DENIED** as moot.

All remaining contentions have been examined, are not rendered meritless and/or moot.

This constitutes the Decision and Order of the court.

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

HON. CAROLYN E. WADE, J.S.C.

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