

Abelson v Burger Fulton, LLC
2021 NY Slip Op 31761(U)
May 25, 2021
Supreme Court, New York County
Docket Number: 153952/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

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DAVID ABELSON,

Plaintiff,

- v -

BURGER FULTON, LLC, MATCH GROUP, LLC, PAIGE
HOSPITALITY GROUP, LLC

Defendant.

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INDEX NO. 153952/2018

MOTION DATE 05/10/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for

JUDGMENT - SUMMARY

The motion by defendant Match Group, LLC (“Match”) for summary judgment on its crossclaim against Burger Fulton, LLC (“Burger Fulton”) and to dismiss plaintiff’s claims against it is granted.

Background

On the evening of December 31, 2017, plaintiff attended a New Year’s Eve event promoted by defendant Match and located at a restaurant managed and owned by defendants Burger Fulton and Paige Hospitality. Match is an online dating service located in Texas that advertises and sponsors events. Plaintiff claims that while he was dancing, he slipped and fell on a “slippery condition” on the dance floor, causing him to break his ankle.

Match moves for summary judgment on the ground that it only advertised the event but had no obligation to keep the dance floor free from wet conditions. Match points out that it was Burger Fulton who was to provide food, beverages and to maintain insurance coverage. It

contends that Burger Fulton has sole control and management of the event. Match argues that while it hired a local vendor to check in guests, Burger Fulton was expected to perform its typical functions, including providing bartenders, servers, and cleaners.

In opposition, plaintiff claims that there are issues of fact with respect to Match's liability. He contends that the event was "Match event" that required patrons to register, a Match employee scouted the venue in advance of the event and directed the set up. Plaintiff argues that he noticed the slippery condition on the dance floor about an hour before his fall and told a bartender, who assured him it would be handled.

Burger Fulton also offers opposition. It claims that Match did not meet its prima facie burden for summary judgment on its crossclaim for contractual indemnity. Burger Fulton claims that the agreement did not mention defense—it merely required that Burger Fulton would indemnify and hold Match harmless.

In reply, Match insists that the promoter or advertiser of an event cannot be held liable for an injury unless that entity exerted control or was in a position to prevent the negligent conduct. Match argues that it never occupied or possessed the event space.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

A defendant who merely sponsors an event owes no duty of care to an injured plaintiff unless it supervised and controlled the event at issue (*Fazzinga v Westchester Track Club*, 48 AD3d 410, 411, 851 NYS2d 278 [2d Dept 2008]). In a similar situation, the Third Department found that a patron at a festival who slipped and fell on ice in the parking lot could not seek damages from the sponsor (*Golonka v Saratoga Teen & Recreation of Saratoga Springs*, 249 AD2d 854, 854, 672 NYS2d 472 [3d Dept 1998]). The test was whether the sponsor "possessed or controlled the armory premises during the festival, such that it would have had a duty to maintain the parking lot in a reasonably safe condition" (*id.* at 854-55).

Here, the Court concludes that Match did not possess or control the event space. It is undisputed that Burger Fulton provided the bartenders, servers and cleaners at the event and there is no evidence that Match had any role in keeping the space free from slippery conditions. And the agreement between Match and Burger Fulton provided that the "Venue will have sole

control and management of the event” (NYSCEF Doc. No. 60 at 5). Accordingly, the Court finds that Match had no duty to plaintiff to keep the dance floor free of wet or slippery conditions.

The Court recognizes that Match had some role planning the event and in the layout of the event. But that does not mean Match was responsible for wiping up a slippery substance on the dance floor. Moreover, the Court observes that plaintiff told a bartender (under the control of Burger Fulton) about the slippery dance floor prior to his fall and was told it would be fixed. Under these circumstances, the Court awards Match summary judgment dismissing plaintiff’s claims against it.

With respect to Match’s motion against Burger Fulton, the Court grants Match summary judgment on its claim for contractual indemnification and defense costs. “In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]). There is no disagreement that Match and Burger Fulton entered into an agreement that required Burger Fulton to “indemnify and hold harmless Match . . . from and against any claims, causes of action, damages or liabilities and expenses (including the payment of reasonable attorneys’ fees and disbursements) . . . arising out of or relating to the . . . (ii) operation and management of the Event” (NYSCEF Doc. No. 60 at 5).

Clearly, the instant lawsuit satisfies the requirements of this provision. Although Burger Fulton is correct that the agreement does not specifically say that Burger Fulton is obligated to provide “defense” costs, the agreement requires Burger Fulton to pay reasonable attorneys’ fees, the practical equivalent of defense costs. The Court also observes that Match only moved with

respect to defendant Burger Fulton and this decision only applies to that defendant (it does not apply to defendant Paige Hospitality).

Accordingly, it is hereby

ORDERED that the branch of the motion by defendant Match Group, LLC for summary judgment dismissing plaintiff's claims against it is granted; and it is further

ORDERED that the branch of the motion by defendant Match Group, LLC for summary judgment on its cross-claim for contractual indemnity as well as defense costs against defendant Burger Fulton is granted and the issue of reasonable defense costs owed to Match Group, LLC is severed and shall be determined at a remote hearing to be scheduled by the clerk of this part.

5/25/2021

DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE