SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

DASHEKIA HOLLAND, MONIQUA KELLY, and VIANCA KELLY,

Plaintiffs,

-against-

ARCO ACQUISITIONS, LLC, 204TH STREET, LLC, PARK AVENUE HOLDINGS LLC, TIKI HOOKAH LOUNGE CORP. and JANE DOE,

Defendants.

x

Index No. 617063/19

Motion Seq: 002 MG
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause……	22-33
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Defendants Arco Acquisitions, LLC (Arco), 204th Street LLC (204), and Park Avenue Holdings LLC (Park) collectively move for summary judgment dismissal of all claims and any and any and all cross-claims and counterclaims asserted against them. Plaintiffs oppose the requested relief.

This action arises from an incident that occurred on April 14, 2019, at approximately 1:45 a.m., at the Tiki Hookah Lounge in Farmingville, Suffolk County, New York. At its core, the plaintiffs claim that they were assaulted by an unidentified individual named herein as "Jane Doe." The complaint alleges five causes of action against the moving defendants sounding in alleged liability based on the Dram Shop Act, negligent hiring and supervision, negligent security, intentional infliction of emotional distress, and negligent infliction of emotional

distress. The fourth cause of action for assault and battery is apparently alleged only against Jane Doe.[1]

Upon consideration of the evidence submitted in support of and in opposition to this motion, it is the Court's determination that the moving defendants are entitled to summary judgment dismissal of the complaint and any and all cross-/counterclaims alleged against them on the bases that they are absentee landlords, without notice of any dangerous condition on the premises, without any responsibility for hiring, supervision, or security threat, and who did not serve any alcohol to the unidentified assailant, Jane Doe.

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[l974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiffs (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id***.) "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" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

In support of their motion, the moving defendants submit, *inter alia*, the pleadings, the lease agreement, the assignment and assumption of the lease, and the affidavit of Albert Barnathan, a member of Arco, who is the majority owner of the strip shopping center in which the Tiki Hookah Lounge (the Lounge) was located on April 14, 2019.

According to Mr. Barnathan's affidavit, the moving defendants purchased the shopping center in December 2017, and all tenants were notified of the sale. Arco has a 68.21% undivided fee interest in the shopping center located at 1075 Portion Road in Farmingville; 204 has a 17.75% undivided fee interest, and Park has a 14.04% undivided interest in that property, as tenants in common. Rents are paid directly to Arco pursuant to the "Notice to Tenant of Sale of Property" that is dated December 29, 2017. The Assignment and Assumption of Lease made between the prior owners of the shopping center and the moving defendants is also dated and effective December 29, 2017.

Further according to Mr. Barnathan's affidavit and the supporting documentation, the relevant lease that was assigned and assumed by the moving defendants was made between the

[1] By notice dated November 2, 2020, this action was discontinued against defendant Tiki Hookah Lounge Corp. Plaintiffs have not filed an amended complaint naming "It's Moore Entertainment"/Michael Moore as a defendant(s) despite this issue having been discussed with the Court and counsel for the parties in July 2020.

prior owners of the shopping center and It's Moore Entertainment. Mr. Barnathan states that It's Moore Entertainment was a tenant of Units 2 and 3, also known as Unit E9, according to the written five-year lease effective July 1, 2016. It's Moore Entertainment is no longer a tenant at the shopping center owned by the moving defendants, having terminated its lease with the defendant owners effective May 31, 2019. The moving defendants were the owners on the date of the alleged incident involving the plaintiffs in this action.

Based upon the submitted lease, and Mr. Barnathan's affidavit, it is clear that the moving defendants were not permitted to enter the subject premises without "reasonable prior notice" to the tenant, "subject to Tenant's reasonable security requirements after reasonable prior notice (but no less than twenty-four (24) hours except in the case of emergent circumstances no notice shall be required and always in the presence of an officer of Tenant) at such hours as shall not unreasonably interfere with the Tenant's business for the purpose of inspection and permit them or any of their agents or contractors to enter for the purpose of complying with any law, order or requirement of any governmental authority or insurance body, or exercising any right reserved to the Landlord under Section 8 hereof or elsewhere by this Lease although this provision does not impose any independent obligation upon Landlord to perform such work." Section 8 provides in relevant part that, "Tenant shall permit Landlord and its agents and representatives to inspect Tenant's Improvements at any time upon 48 hours prior notice, and in the presence of Tenant's general contractor. . ."

It is also clear that the tenant had the responsibility for repairs and maintenance of its unit(s), that the tenant would "hold harmless" the landlord from any injury or damage, that the landlord would not be liable for any injury to persons on the premises, that the tenant was obligated to provide security to the premises, that the tenant was responsible for damages caused by its persons, licensees or invitees to the shopping center, and that the tenant was required to procure a comprehensive insurance policy naming the tenant and the landlord as named insureds.

Based upon the uncontroverted terms of the lease, plus the affidavit of Mr. Barnathan, it is also established that the landlord defendants had no ownership or financial interest in either It's Moore Entertainment or the Lounge, that the landlords did not derive any financial benefit from the sale of alcohol on the Lounge premises, that the landlords were not responsible for obtaining or renewing the Lounge's liquor license, nor did the landlords supply/sell/furnish alcohol to patrons of the Lounge. There are also no terms in the subject lease requiring the landlords to provide security, hire personnel for the Lounge, supervise persons hired by the Lounge, or supervise the behavior of patrons of the Lounge.

In his affidavit, Mr. Barnathan also attests that, "[t]he defendant owners were not present at the subject property at the time of the alleged occurrence. The defendant owners never received any complaints or notices regarding any assaultive, violent, or dangerous behavior on the part of any patrons, staff, or management of the Tiki Hookah Lounge on or before the date of the alleged occurrence. Indeed, the defendant owners have never received any complaints regarding any physical altercations, criminal conduct, or 'poor reputation' of the Tiki Hookah Lounge."

Here, there is no structural or physical condition of the subject premises that is alleged to have caused the plaintiffs' injuries. A lease provision permitting a landlord to enter and inspect the premises and/or make needed repairs does not impose liability on the landlord unless the dangerous condition is one of a significant structural or design defect that is violative a specific statutory safety provision (*see* ***Guzman v. Haven Plaza Housing Development Fund Company***, 69 NY2d 559, 565 [1987]). Also, "a landlord's mere reservation of the right to enter a leased premises to make repairs is insufficient to give rise to liability for a subsequently arising dangerous condition" (***Aprea v. Carol Management Corp.***, 190 A.D.2d 838, 838 [2d Dept 1993]). Plaintiffs in this case allege that the behavior of Jane Doe is the direct cause of their injuries, not a state of disrepair or other dangerous condition of the subject premises; therefore, the mere reservation of the right to enter provided for in this lease utterly fails to impose liability upon the moving defendants.

Based upon the evidence submitted in support of the instant motion, the moving defendants have demonstrated that they were out-of-possession landlords (***Mendoza v. Manila Bar & Restaurant Corp.***, 140 AD3d 934, 935 [2d Dept 2016]). "[A]n out-of-possession landlord is not liable for injuries that occur on the leased premises due to the criminal acts of third parties unless it has retained control over the premises or is contractually obligated to provide security" (***Tambriz v. P.G.K. Luncheonette, Inc.***, 124 AD3d 626, 627 [2d Dept 2015]). So, without having retained control of the day-to-day operations of the Lounge, and therefore the opportunity to control the conduct of others, the moving landlord defendants owed no duty to the plaintiffs (***Inger v. PCK Development Company, LLC***, 97 AD3d 895 [3d Dept 2012]; ***Repetto v. Alblan Realty Corp.***, 97 AD3d 735, 736-737 [2d Dept 2012]; ***DeJesus v. New York City Health & Hospitals Corp.***, 309 AD2d 729 [2d Dept 2003]; ***Borelli v. 1051 Realty Corp.***, 242 AD2d 517 [2d Dept 1997]).

Moreover, specifically as to the Dram Shop Act cause of action (collectively ***General Obligations Law §§ 11-100, 11-101, Alcoholic Beverage Control Law § 65***), the applicable statutes impose liability on any provider of alcohol who sells, delivers or gives away, or causes or permits alcohol to be sold, delivered or given away to any person under the age of twenty-one (21) years, or to any visibly intoxicated person (*see* S***herman v. Robinson***, 80 NY2d 483 [1992]). Here, as noted, the moving defendants had no business interest in the Lounge and there is no evidence that they supplied alcohol to anyone, let alone to "Jane Doe." Also, because "Jane Doe" is not identified, there is no evidence that she was either under 21 years of age, or that she was visibly intoxicated.

Accordingly, the moving defendants have demonstrated their *prima facie* entitlement to summary judgment dismissal of the complaint in its entirety, and of any and all cross-claims and counterclaims asserted against them.

In opposition, the plaintiffs submit their own brief affidavits and the results of a FOIL request made to the Suffolk County Department of Audit and Control. The plaintiffs also maintain that the defendants failed to meet their *prima facie* burden because there are no affidavits from 204 and Park, that there is no foundation for this Court to consider the lease

agreement, and that Mr. Barnathan does not state the basis of his knowledge that he is unaware of "prior occurrences" on the subject premises.

Notably, the plaintiffs do not contest the moving defendants' assertion and proof that they are out-of-possession landlords, and nothing in the proof submitted in opposition controverts this fact, or raises a triable issue in this regard. Mr. Barnathan's affidavit is duly sworn and Arco, with the largest undivided fee interest in the shopping center, is the only entity to which the tenant (It's Moore Entertainment) was directed to pay its rent; thus, his affidavit is sufficient to establish the facts stated therein, including authentication of the lease agreement, and the assumption of the lease. Even if the Court were to consider the lease hearsay, which it does not, "in civil cases, 'inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess' (Jerome Prince, Richardson on Evidence § 8-108 [Farrell 11th ed 2008], citing *Matter of Findlay*, 253 NY 1, 11, 170 NE 471 [1930]" (***Rosenblatt v. St. George Health & Racquetball Assoc., LLC***, 119 A.D.3d 45, 54-55 [2d Dept 2014]).[2] The Court finds the lease probative, especially since it was sworn to before a notary public.

The plaintiffs' individual affidavits each state in conclusory fashion that, "we were physically assaulted and attacked by Jane Doe, due to the negligence of Defendants." The plaintiffs do not even allege that they observed Jane Doe to be underage or visibly intoxicated; accordingly, their affidavits are wholly unpersuasive and fail to raise any triable issue of fact as to any of the causes of action alleged in the complaint. Notably, the plaintiffs also fail to allege in their respective affidavits that they have suffered any emotional distress, nor does their collective Bill of Particulars allege intentional or negligent infliction of emotional distress.

The FOIL request result is also irrelevant and does not raise an issue of fact concerning what, if anything, the moving defendants knew or should have known about prior criminal activity at the Lounge. The FOIL request is for "[a]ll incident reports for the premises known as Tiki Hookah Bar/Lounge, 1075 Portion Road, Farmingdale, New York 11738 for a period of four years prior to 04-14-2019." So, the period of time encompassed by this FOIL request was from approximately April 14, 2015 to April 14, 2019. First and most importantly, any incidents that may have occurred at the Lounge are irrelevant in the absence of a duty, which the moving defendants, as out-of-possession landlords, did not have (***Tambriz***, ***supra; Borelli***, ***supra***).

Second, the moving defendants did not own the shopping center in which the Lounge was located until on or about December 29, 2017; therefore, any incidents reported prior to December 29, 2017, to the extent that they can even be identified as "criminal," could not have been known by these defendants. Also, the tenant that operated the Lounge, It's Moore Entertainment, did not commence its tenancy until July 1, 2016; therefore, any incidents occurring prior to that time could not have involved the Lounge/It's Moore.

[2] The case relied upon by plaintiffs is inapposite since the Court in that matter determined that the lease agreement was of little probative value because the date of the subject accident did not fall within the date range for the rental period for the subject truck listed thereon (***Alfaro v Lavacca***, 186 AD3d 1591, 1593 [2d Dept 2020]).

Third, although the request was made for incidents at the Lounge, the response to the FOIL request does not specify that the information reported therein is related to units 2 and 3/E9, which is the location that the Lounge occupied at 1075 Portion Road. 1075 Portion Road is the address of the entire shopping center. Moreover, there is no indication evident from the brief descriptions listed that any of the incidents occurred inside the Lounge prior to the subject incident.

Plaintiffs' opposition has failed to raise any material, triable issue of fact sufficient to defeat the defendants' summary judgment motion; accordingly, the defendants' motion is granted in its entirety and the complaint, and any and all cross-claims and counterclaims, are hereby dismissed as to Arco, 204 and Park.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 13, 2021
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]